AN INQUIRY INTO THE MANNER OF CREATING PEERS.

——*Antiquam exquirite Matrem.*
VIRG.

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PEERS

CREATING

OF

MANNERS

IMPORTED

INTO

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THE Leaders of thoſe Warlike Nations who overturn'd the *Roman* Empire, did in proceſs of time become Kings of the reſpective Provinces which they Conquer'd: And by the Diſpoſition and Regulation of Property, which they reſpectively eſtabliſh'd among their Followers, gave Birth to what was afterwards call'd the *Feudal-Law*. For by the *Feudal-Law* muſt not be intended, thoſe Laws by which the *Goths* (or by whatſoever other Name the Glorious Founders of the *European* Monarchies were known) were govern'd while they were as yet in their own Countries, but thoſe which after the Acquiſition of their ſeveral Provinces, the Conquerors by a Common Neceſſity were oblig'd to obſerve, that they might be able to keep Poſſeſſion of their Conqueſts. And hence is it that the Form of their Civil Government, was taken from that of their Army. The Antient Inhabitants of the Countries Conquer'd, not being to be truſted with too large a Share of Property, the Diſtribution of Lands (which was the Reward of the Conquering Army) was made with a View to the keeping them in perpetual Subjection.

But without entring particularly into the Hiſtory of the Riſe and Progreſs of the *Feudal-Law*, it will be ſufficient to obſerve, that in a ſmall Compaſs of time, it ſpread over all *Europe*; the ſeveral Conquerors of the *European* Provinces, being engag'd by a likeneſs of Circumſtances,

cumſtances, to eſtabliſh Laws ſimilar to each other. And a Kingdom, upon their Principles, is to be conſider'd no otherwiſe than as one great Seignory or Dominion, of which the King is the Chief Lord. For the whole conquer'd Territory was at firſt divided into Two Parts: One of which was reſerv'd for the Support and Revenue of the Crown, and was manur'd by the proper Tenants and Husbandmen of the King. Which Share of the Lands was the *Sacrum Patrimonium Principis*, and the inſeparable Inheritance of the Crown, and is ſtyl'd in the Book of Domeſday, *Terra Regis*, and is now known in Law, by the Name of *Antient Demeſne*. The Occupyers of theſe Lands, were all Tenants in *Socage*, and (among other their Privileges) they cou'd not by Law be oblig'd to ſerve in the Wars.

Fitz-Herbert. Stat. de Militi. 1 Ed. 2. cap. 6.

For the Defence therefore of their new eſtabliſh'd Kingdoms, the other part of the Land was divided among the Military Men; in a Manner ſo like what was practis'd by *Alexander Severus* in ſome Frontier Provinces of the *Roman* Empire, that it has been thought by Men of very conſiderable Learning, to have been the Foundation of the *Feudal-Law*: The Barbarians making uſe of that Method, which they found employ'd by that Emperor for the defence of his Provinces, to maintain themſelves in the Poſſeſſion of theirs. As the Words of *Ælius Lampridius*, from whom this Paſſage is taken, are very remarkable, I have thought fit to tranſcribe them. "Sola quæ de Hoſtibus capta "ſunt Limitaneis Ducibus & Militibus donavit, ita "ut eorum ita eſſent, ſi Hæredes illorum militarent, "nec unquam ad Privatos pertinerent dicens attentiùs "eos militaturos, ſi etiam ſua Rura defenderent. For this Purpoſe therefore, Provinces were granted to *Dukes*, Sub-Diviſions of them, or Counties to *Earls*, Caſtles and Seignories to *Barons*; ſubject, among others, to this Condition, of ſerving in the Wars with a preſcribed Number of Men.

In vitâ Alexandri Severi.

Theſe *Fiefs*, as they were afterwards call'd, were Originally, at moſt but for Term of Life; and when in Proceſs of time they became Hereditary, this Condition of Military Service was ſo annex'd to the Poſſeſſion of Land, that every *Donee* and his Heirs were oblig'd, not *ex pacto vel conditto*, but of Common Right, without any expreſs Reſervation in the Grant for that Purpoſe,

Purpoſe, to render all Feodal Duties and Services whatſoever.

This *Feudal Law* prevail'd ſo univerſally, that while the *Civil Law* was buried for ſeveral Ages and forgotten, it was, as it were, the *Jus Gentium* of *Europe*. As for *England* in particular, the *Civil Law* was ſcarcely ever admitted, whenas the Bulk of our *Common Law* is nothing but Feudal Cuſtoms. And *Bracton* thought, that *Counties* and *Baronies* were in a manner eſſential to the Being of a Kingdom; *Regnum*, ſays he, *quod ex Comitatibus & Baroniis dicitur eſſe conſtitutum*: And the Author of the *Mirror of Juſtices*, after mentioning ſeveral of the Royal Prerogatives, adds, "Theſe "Rights the firſt Kings held, and of the Reſidue of "the Lands they did enfeoffe the *Earls*, *Barons*, "*Knights*, *Serjeants* and others, to hold of the King "by the Services provided and ordained for the De-"fence of the Realm, according to the Articles of "the Antient Kings." And for this Reaſon therefore do all our Lawyers affirm, that no Subject does poſſeſs any Land in *England* abſolutely free, but that it is all held mediately or immediately of the Crown, it being but Partially or Conditionally, and not Abſolutely granted to him.

Lib. 2. c. 34.

C. 1. ſ. 3.

Co. Lit. ſ. 1. Smith de Rep. l. 3. c. 10. Somner Gavel. p. 109, &c.

At the Time of the Conqueſt the *Feudal Law*, as it was underſtood and practis'd in *France*, flouriſh'd in its full Vigour in *Normandy*. Not that the Cuſtoms of *Normandy* were entirely the ſame with thoſe of *France*, ſince that was impoſſible, each Province of that Kingdom, even at this Day having diſtinct and different Cuſtomaries, tho' all founded upon the ſame Principles, as appears by their greateſt Lawyers, conſtantly explaining the Cuſtoms of one Province by thoſe of another. But that (in like manner) *Rollo* upon his Conqueſt of *Neuſtria*, afterwards call'd *Normandy*, for the Preſervation of his Acquiſition, did eſtabliſh Laws (as his Circumſtances were the ſame) much reſembling thoſe which had been enacted by the *Franks*, upon their Conqueſt of *France*, which, as Intercourſe and Commerce between the two People encreas'd, acquir'd a ſtill greater Likeneſs. Now altho' there were Military Tenures in *England*, during the time of the *Saxons*, yet it is certain that they underwent a very great Alteration by the Acceſſion of *William the Conqueror* to the Throne, who eſtabliſh'd many Feudal

Oeuvres de Baſnag. Vo. 1.

Cuſtoms for Law, that he brought with him from *Normandy*.

Fiefs had in *France*, not many Years before our Conqueſt, been made Hereditary with no other View than to ſecure the Succeſſion of the Crown to one Family. For *Hugh Capet*, who uſurped the Crown of *France*, to the entire Excluſion of the *Carolovingian* Line, in order to make it the Intereſt of all the leſſer Nobility (for perhaps ſome of the greater *Fiefs* had been made Hereditary ſooner thro' the Weakneſs of the *French* Princes) to ſupport his Title, did in the Year 988 grant to them, that from thenceforth they ſhould hold their *Fiefs* to them and their *Heirs* for ever, in a Feodal Manner by the Ceremony and Oath of *Homage* and *Fealty*. This Example was wiſely followed by *William* the Conqueror, who immediately transferr'd (if Sir *Harry Spelman* is to be believ'd) this *French* Cuſtom of making *Fiefs* Hereditary into *England*, neglecting the former Practice of our *Saxon* Anceſtors, who had till that time continued the Tenure of their *Fiefs* either Arbitrary, or at leaſt in ſome definite Limitation, as for Life, *&c.* But what makes this Speculation the more probable is, that for a long time after the Conqueſt, the Rules of the Deſcent of Land at the Common Law were very uncertain. Which is exactly conformable to what happened abroad, during the Infancy of the Feudal Law, in which the Succeſſion to Fiefs was but by ſlow Degrees reduc'd to a Certainty. " Antiquiſſimo tempore ſic erat in Do-
" minorum Poteſtate connexum, ut quando vellent,
" poſſent auferre rem in feudum a ſe datam. Poſtea
" vero eò ventum eſt, ut per annum tantum firmita-
" tem haberent. Deinde ſtatutum eſt ut uſque ad
" Vitam fidelis produceretur. ——— Sic progreſſum
" eſt, ut ad filios deveniret. " My Lord Chief Juſtice *Hales* does obſerve out of *Glanvil*, that in the Reign of *Henry* the Second, if a Man had two Sons and the Eldeſt dy'd in the Lifetime of the Father leaving a Son or Daughter and then the Father dy'd, it was controverted whether the Nephew or the Son ſhould ſucceed as Heir to the Father. The Chief Juſtice adds that the better Opinion ſeems to be for the Nephew; but then this Obſervation muſt be added, that tho' *Glanvil* does declare for the Nephew, it is not generally but upon Condition, for if the Father of the

Lib. Feudor. 1. tit. 1.

De Succeſſion. Lib. 7. c. 3.

the Nephew had been by the Grandfather provided for with a ſufficient Portion, and been as it were manumitted and made *ſui Juris*, in ſuch Caſe the Nephew according to *Glanvil* was not Heir. But if the Father dy'd during the Life of the Grandfather while he was part of the Grandfather's Family, and *Sub ejus poteſtate*, without any ſeparate Eſtate of his own, in ſuch caſe only was the Nephew Heir. " Ita dico ſi Pater " ſuus non fuerit ab avo ſuo foris familiatus———— " ſi quando partem terræ ſuæ aſſignet Pater filio ſuo " & Seiſinam faciat, ————tunc enim non poterint " Hæredes ipſius filii de Corpore ſuo aliquid amplius " petere contra avunculum ſuum vel alium de reſiduâ " parte Hæreditatis avi ſui. But beſides what is now obſerved out of *Glanvil*, it is certain that much harder Caſes did happen at the time that he wrote. For ſometime by the *Feudal Law*, if the Father dy'd leaving ſeveral Sons, the Lord of the *Fief*, tho' he was obliged to give it one of them, was yet at Liberty to grant it to which he pleas'd. " Progreſſum eſt ut " ad Filios deveniret, in quem, ſcilicet Dominus hoc " vellet beneficium confirmare. Lib. Feud. ubi ſuprâ.

That the King had a Prerogative ſomewhat like this in relation to Female Heirs is certain, for by *Fitz-Herbert* it appears, that if a *Baron* dy'd leaving only three Daughters, if the two Eldeſt were Married, *&c.* The King had the Marriage of the Youngeſt, to whoſe Husband the King cou'd grant the whole Inheritance of the Father, entirely excluding the other Siſters. But this was not all, for during the ſame Reign of *Henry* 2. a Man dy'd leaving a Son by a firſt Wife, and another Son by a ſecond Wife, the King claim'd and actually exercis'd the Prerogative of beſtowing the Fief upon the ſecond Son, tho' by a different Ventre. Becauſe he judg'd him to be a Man abler to perform Knightſervice than the other. " Galfridus de Mande- Mag. Rot. " ville Senex tenuit Baroniam de Merſewude—— & 10. " genuit de primâ Uxore ſibi deſponſatâ Robertum Joa. Re. " de Mandevillâ. —— Galfridus autem Senex de Man- Ro. 11. b. " devillâ ——— aliam Uxorem deſponſavit de qui Dorſet. & " genuit Radulphum de Mandevillâ Qui poſt obitum Somerſet. " ipſius Galfridi ſenis tenuit prædictam Baroniam per " voluntatem Henrici Regis eò quod fuit melior Mi- " les, quam Robertus de Mandevillâ Frater ejus. Prescription. 3 H. 3. n. 56.

The

The Army of *William* the Conqueror was compos'd of ſeveral Nations, who in order to make their Fortunes by the ſpoil of the *Engliſh*, had Liſted themſelves in the Service of the *Norman*. " Galli namque & Britones, " Pictavini & Burgundiones, aliique Populi Ciſalpini " ad bellum Tranſmarinum convolârunt & Anglicæ " Prædæ inhiantes. And among all thoſe People, as well as in *Normandy*, the *Feudal Law* not only prevail'd, but was underſtood almoſt in the ſame manner. Now as I do not propoſe to Write a Juſt Treatiſe upon the Original and Nature of *Peerage*, but only to enquire into the Manner How! the Prerogative of creating *Peers* was antiently exercis'd by the Crown, I ſhall not carry my preſent Reſearch higher than the Conqueſt. What Eſtate the Chief *Thanes* among the *Saxons* (who Mr. *Selden* ſays were the King's immediate Tenants of Lands held as of his Perſon by perſonal Services, which therefore he thinks to be a kind of Grand-Serjeanty) had in their Honours, or how they were created, not being neceſſary to be determin'd in the Examination of a Point, that as to the firſt part of it, turns chiefly upon the *Feudal Law*, as it was underſtood in *England*, ſoon after the Conqueſt.

Order. Vital. in Vi. Wi. 2.

Tit. of Honor. p. 507--8.

Peerage according to the Common Opinion, is by three manner of Ways, that is, by *Tenure*, by *Writ*, or by *Letters Patents*. But before I enter into the Conſideration of either of them, it muſt be obſerv'd that it is agreed by all, that from the Conqueſt untill the latter end of the Reign of *Henry* 3d the *Barons* were all Feudal and by Tenure, and Conſequently their Appearance in Parliament during that time, can be conſider'd no otherwiſe than as a Service annex'd and incident to the Poſſeſſion of their Lands. *Henry* 3d, according to the Learned *Cambden* firſt began the Method of creating *Barons* by *Writ*, thereby excluding ſuch of the leſſer *Barons* by *Tenure* as he pleas'd, and beſtowing an Equal Degree of Honour and Privilege upon Perſons who were not *Barons* by *Tenure*, as upon thoſe who were. Which Method of proceeding continu'd until the 11th of *Richard* II. who firſt introduc'd the creation of *Barons* by *Patent*. Theſe three Periods of time, which exhibit ſo many different Stages of the *Engliſh Peerage*, are ſo remarkable, that I think I cannot obſerve a better Method than to make them the Heads of the following diſcourſe.

In Britan.

The

The whole of Parliamentary buſineſs may be reduc'd under the two general Heads of *Advice* and *Conſent*; ſo far as the Conſent of the *Barons* was wanting to any Propoſition that might be made unto them, their Preſence in Parliament, and ſignification of their Aſſent, was abſolutely Neceſſary to enable the King to do ſome Act which by Law cou'd not be done without their Conſents. And as to the matter of Advice, their Attendance is to be conſider'd only as a Feudal Service, which by the Tenure of their Lands and the Oath of Homage they had taken they were oblig'd to pay unto the King as to the Superior Lord of their *Fiefs*. For it was a Notion Common to all the *Gothick* Nations, that their Kings had no Right to any Duties or Services whatſoever, but what were purely *Feudal*. Nor did any Man think himſelf oblig'd to the performance of any further Service, than was annex'd to the Tenure of his Lands. And therefore as to all other things that were *Extra-Feudal*, the particular Conſent of the Parties who were to perform them either in Perſon or by their Repreſentatives was abſolutely requiſite. Now it is abſurd to ſuppoſe that the Conquerors Native *Normans*, and much more ſo, that the Foreigners who were no Inconſiderable part of his Army, Fluſh'd with the Merit of Conquering a Kingdom for their General, wou'd ſuffer themſelves to be worſe us'd in *England* than they had been in their own Country. That Prince therefore, (who was not likely to abate any thing of his Juſt Prerogative,) never pretended to any thing from his Followers, that was not founded upon the known Principles of the *Feudal Law*, as appears by the Laws which he enacted; "Volumus etiam ac firmiter "præcipimus, ut omnes Liberi Homines totius "Monarchiæ Regni noſtri prædicti habeant & teneant "terras ſuas & poſſeſſiones ſuas bene & in pace liberè "ab omni exactione injuſtâ & ab omni Tallagio, Ita "quod nihil ab eis exigatur vel capiatur niſi Servitium "ſuum liberum quod de jure nobis facere debent & "facere tenentur, & prout Statutum eſt eis & illis a "nobis datum & conceſſum, Jure Hereditario in "perpetuum per Commune Concilium totius Regni "noſtri. Inter Leges W. 1. Lex. 55.

Parliaments were not formerly ſo regular in point of Form as they now are, ſince even the Number of Knights to be choſen for each Shire, to ſerve in the Houſe

House of Commons was for some time uncertain. The first Writs for the choice of whom that are extant, are
M. 6. dor. 22 *Ed.* 1. by which Two Knights only, as at this Day, were directed to be chosen for each County: But then the King not being satisfy'd with that Number, as appears by another Writ entred upon the same Dorse, the Sheriffs are commanded to cause Two other Knights to be chosen; Which way of Proceeding being at last thought inconvenient, was remedied by the Statutes of 5 *R.* 2. c. 4, 7. *H.* 4. c. 15. and several Other subsequent Statutes, which have contributed to the reducing the House of Commons to that Method and Form we now see it in. Now one Reason why these Circumstances were not determin'd in the Earlier times may possibly be, that they were then more concern'd about the Essentials of Government than the Forms. When no Prince in *Europe* had as yet imagin'd, that he had a Right to Rule in all things without a Parliament or Assembly of Estates; Provided the Consent of the Persons who were either to pay or perform any thing *extra-feodal*, was *bonâ fide* apply'd for and obtain'd, they were not over-sollicitous concerning the Manner in which it was apply'd for and obtain'd. But as the People grew jealous of the Crown's designing to impose Contributions, *&c.* upon them without their Consent, these (otherwise) Formalities were thought necessary to be regulated and fix'd. For certainly such things have been formerly Done by each House in Parliament, and that without any Complaint, which if they were now to happen, wou'd be universally condemn'd as Unparliamentary and Illegal. Both Lords and Commons have separately and by themselves given Aids and Subsidies unto the Crown; as for Instance,
Rot. Parl. in 13 *Ed.* 3. the Lords granted to the King the Tythe
n. 6. of all the Corn, *&c.* growing upon their Demesnes; the Commons at the same time granting nothing, nor any wise concerning themselves, with what the Lords thought fit to grant out of their own Estates. At other times the Knights of Shires separating themselves as it were from the rest of the Commons, and uniting themselves to the Lords, have granted a Subsidy, and the representatives of Cities and Boroughs have likewise separately by themselves, granted Subsi-
Rot. Pat. dies to the Crown, as appears by a Writ for the Col-
p. 1. m. 22. lection of a Subsidy in 24 *Ed.* 1. "Rex, &c. Cum
"Comites

" Comites Barones Milites, &c. nobis, &c fecerunt un-
" decimam de omnibus bonis ſuis mobilibus. Et Cives
" & Burgenſes, &c. ſeptimam de omnibus bonis ſuis
" mobilibus, &c. nobis curialiter conceſſerint, &c.

But further, when any Affair happened which was not Univerſal, but affected only particular Perſons, it was common for them only to be ſummon'd. Hence is it, that we ſee among the Rolls Several Writs to this purpoſe, as, e. g. *Summonitiones ad Colloquium, de veniendo ad conſilium*, &c. Which tho' they have ſometimes been miſtaken for Parliamentary Writs, are yet nothing but Summons of particular Perſons to conſult, and to contribute towards the expence of an Affair, in which they only (or at leaſt chiefly) were concern'd. As in 35. *Ed.* 3. there is a Writ directed to *Humfry* Earl of *Northampton* (which *Dugdale* however has Printed in his Collection of Writs of Summons to Parliament) wherein after reciting the Confuſion the Affairs of *Ireland* were in, and that he and ſeveral other *Engliſh* Lords had large Poſſeſſions in that Kingdom, and were therefore more particularly oblig'd to the defence of it, it follows " Volumus vobiſcum & cum aliis de
" eodem Regno (Angliæ ſcilicet) terras in dictâ terrâ
" habentibus colloquium habere & Tractatum Vobis
" in fide & Ligeanciâ, &c. Mandamus, &c. But

Rot. Clauſ. 35. E. 3. m. 36. dorſo.

that the Reader may fully ſee, how ſtrictly the Principle of no Perſon's being to be tax'd without their own conſent was obſerv'd, he muſt know, that upon the ſame Occaſion Writs were likewiſe directed even to the Ladies, who were Proprietors of Land in *Ireland*, commanding them to ſend their proper Attornies, to conſult and conſent to what ſhould be Judg'd neceſſary to be done, in Relation to that Affair. " Rex
" &c. Mariæ Comitiſſæ Norfolc. Salutem, &c. Vo-
" bis in fide & Ligeanciâ, &c. mandamus quod——
" aliquem vel aliquos de quibus confidatis apud Weſt-
" mon. mittatis—— ad loquendum nobiſcum——ſu-
" per dictis negotiis —— & ad faciendum & conſen-
" tiendum nomine veſtro, ſuper hoc quod ibidem
" contigerit ordinari.

If this Equity was therefore obſerv'd with reſpect to particular Perſons, it is no wonder that it was always thought neceſſary, as well as reaſonable, to conſult the whole Kingdom in Parliament, upon all Affairs and Demands, which were extra-feodal and of a

concern. And therefore that great King *Ed.* 1. was ſo ſenſible of the Juſtice of this way of Proceeding, that he inſerted in his Writs of Summons to Parliament, as a firſt Principle of Law, and as his Reaſon for ſummoning Parliaments, *That in every Affair which related to the whole Kingdom, the Conſent of the whole Kingdom ought to be requir'd.* The Words are ſo noble that I may be forgiven if I tranſcribe them. " Rex, &c.
Rot. Clauſ. 24. Ed. 1.. m.4. Dor. " Sicut Lex Juſtiſſima providâ circumſpectione Sacro-
" rum Principum ſtabilita hortatur Ut quod omnes
" tangit ab omnibus approbetur, ſic & innuit evi-
" denter ut communibus periculis per remedia pro-
" viſa communiter obvietur.

It is agreed Univerſally, that the *Peers* or Lords of Parliament do relate to, and ſerve for the general good of the whole Kingdom, and as it is agreed, that every *Peer* ſits in the Houſe of Lords in reſpect only of his *Barony*, it will be neceſſary to inquire into the true Notion of the word *Peer*, and likewiſe what conſtituted a *Barony*, during this firſt Period of time of which we now treat. And altho' it is very true, that there were Great or Common Councils both in *England* and *Scotland*, before ſo much as the Inſtitution of Tenures of Land by Knight Service, *&c.* or of Manors in this Kingdom, and that therefore the *Feudal Law*, cannot be conſider'd as the firſt Original
Brady. or Foundation of Parliaments, (as has been by ſome Imagin'd) yet if we conſider the *Engliſh* Government only as it has been ſince the *Norman* Conqueſt, it will be found natural to look upon our *Anglo-Norman* Monarchy to be in *Great*, what every Manor is in *Miniature*, and that therefore our Parliaments do in a great meaſure reſemble, and may (not improperly) be ſtil'd the *Court Baron* of the Kingdom. And I cannot but think this to have been the Notion of Antiquity; for in the great Caſe between the two Kings of *Navarre* and *Caſtille*, which was referr'd to the Judgement of our *Henry* I. and his *Barons*, the *Judgement* is entred (if I may uſe that Expreſſion) in this Manner, *Comites & Barones Regalis Curiæ Angliæ adjudicaverunt.*

Some Authors in order to magnify the Dignity of *Peerage* have aſſerted, that the Term of *Peer* is properly to be deriv'd from the Roman *Patricius*, or at leaſt from the *Patriciatus*, which in the decadence of the Roman Empire, was us'd to denote not only the moſt conſi-

derable

derable Dignity, but alſo Office of the Empire. As this was Originally a *French* Notion, and ſtarted perhaps with no other View than to flatter the *Peers* of *France*, I ſhall wave any further Conſideration of it, ſince in fact (upon Examination) the term appears to be owing to a much more minute Original. And the word *Peers* or *Pares* is altogether feodal, ſignifying nothing but Men equal as to their Condition, Convaſſals in the ſame Court and Liege-Men of the ſame Lord. Recherches de Paſquier L. 2. c. 9.

" Sunt autem *Pares* Curtis (Says *Cujacius*) Qui & " *Pares* Curiæ dicuntur nonnunquam & *Pares* Domûs, " Convaſſalli, Qui ab eodem Domino eademve Domo " feuda tenent; Non quaſi Patricij, ut volunt Ignari " feudorum: with whom Sir *Harry Spelman* Concurrs, when he ſays " *Pares* dicuntur qui acceptis ab eodem " Domino puta Rege Comite & Barone feudis Pari " Lege vivunt. Et dicuntur omnes *Pares* Curiæ, Quòd in " Curiâ Domini illius cujus ſunt Vaſſalli parem habent " Poteſtatem, Scilicet, Vaſſalli Regis in Curiâ Regni, " Vaſſalli Comitis in Curiâ Comitatûs, Vaſſalli Baro- " nis in Curiâ Baronis The Word *Peer* therefore, " tho' now it is by Cuſtom, and κατ' ἐξοχὴν appropriated to the *Peers* of the Kingdom, was yet antiently equally applicable to the Tenants of what Lord ſoever. I think that I need not ſpend more time, in ſhowing the Senſe of this Word. Every one knows that in *Magnâ Chartâ* it is us'd in the moſt general Senſe " Nullus Liber " homo, *&c.* niſi per Legale Judicium *Parium Suorum*. But in the Laws of *Henry* the firſt, the Word *Pares* or *Compares* is uſed in a perfect Feudal Senſe, to denote the Tenants of the ſame Manor. " In Denelaga Laſhe- " lutes, niſi ſuper Sancta Jurare poterit, *&c.* Sive in " Comitatu, vel in quovis placito Regis fiat de ſuâ " vel alterius cauſâ, vel inter *Compares* in Curiis vel " diviſis vel locis ſuis.

Cujac. Com. in Lib. 1. de feud. tit. 1. p. 18.

In Gloſſar:

Cap. 29.

Cap. 34.

But further it muſt be obſerv'd, that altho' the term *Baron* as well as *Peer* has been by Common Uſage appropriated to the Lords of Parliament, that yet antiently it was us'd to ſignify any Freeman whatſoever; The Freemen of the City of London are by our old Hiſtorians frequently ſtyl'd *Barons*, ſo likewiſe of *York* and ſeveral other places. The Barons of the Cinque Ports retain their name unto this day. Nor is it Surprizing that this Word was ſo apply'd by thoſe Authors, who were perfectly Ignorant not only of the

Elegancy, but alſo of the Propriety of the Language they wrote in. Very little therefore can be concluded from the Phraſe of a Monkiſh Hiſtorian, who generally choſe his Words at leaſt as much for the ſake of the ſound, as the ſenſe. For the Citizens of *London* have been ſtyl'd not only *Barons* but *Heroes*, by *Ingulphus*, who giving the Character of one *Singinus* an Officer of what may be call'd the London *Militia*, ſays that he was "Inter omnes *Heroes Londonienſes* Viribus Robuſtiſſi-"mus. The true Senſe therefore of Words of this nature is not to be taken from the Hiſtorians, but from the Lawyers, and Legal Proceedings of Antiquity, from which it appears, that this Word came to be us'd in a perfect Feudal Senſe, and to denote the chief Tenants of any Lord. For not only thoſe who were the chief Tenants of the Crown, but alſo thoſe who under them held great Quantities of Land by Feudal Services, were ſtyl'd *Barons*. And the term *Baron* when apply'd to the Tenants of Land, was always relative to ſuch or ſuch a Lord. The Chief Tenants of the King were the *Barones Regis*, and ſo ſtyl'd to diſtinguiſh them from the *Barons* of other Lords. Thus in *Chartâ Henrici* I. "Si amodo exurgat, placitum de diviſione "terrarum, ſi intereſt *Barones meos Dominicos*, tractetur "placitum in Curiâ meâ. The Eight Barons of the County Palatine of *Cheſter* are ſo well known, that they need not be here mentioned; and the moſt conſiderable Tenants of the Abby of *Ramſey*, are in a Charter of *Henry* the Firſt ſtyl'd Barons of that Abby, "Sciatis "coram me teſtificatum & recognitum per *Barones de* "*Honore de Rameſiâ*. Which uſe of the Word is likewiſe common to other Feudal Countries; thus in the *Sicilian* Conſtitutions, to add no more (and I make choice of them as a Foreign Inſtance, becauſe their Government, as well as ours, was of a *Norman* Original, and is therefore in many Particulars, at leaſt till it was corrupted by *Spaniſh* Vice-Roys, very ſimilar to that of *England.*) "Poſt mortem *Baronis* vel Militis, "qui a Comite vel *Barone* alio, *Baroniam aliquam* vel "Feudum tenuerit. The Terms therefore of *Peers* and *Barons* were antiently frequently us'd as ſynonimous; for as the *Barons* of the Crown were indifferently ſtyl'd either *Barons* or *Peers*, ſo likewiſe were the Freeholders of every Manor, as is evident from the Phraſe of *Court Baron* ſtill in uſe.

De tenen. Comit. & Hundred.

Lib. Rameſien. apud Spelman.

Conſtit. Sicul. l. 3. tit. 22.

Barons

Barons and *Baronies* (as is before obſerv'd out of *Bracton*) were of the Eſſence of a *Gothick* Kingdom, in like manner as Freeholders are eſſential to a Manor. Every Man has a right to be try'd by his *Peers*, which is a right not originally peculiar to *Engliſhmen*, ſince as to Feudal Queſtions it was common to all the *Gothick* Nations, among whom it was an univerſally receiv'd Maxim, that no Man cou'd be diſſeis'd of his *Fief*, but by the Judgement of the *Tenants*, who were his *Peers*, of the ſame *Barony* or *Manor* of which it was held. And ſince all the Judicial Acts of a Lord are done in a *Court Baron*, which cannot be held without Freeholders, therefore by the *Feudal Law* every *Baron*, or (in the Senſe we now uſe it) Lord of a *Manor* was oblig'd to keep within his *Barony* a ſufficient number of Freeholders; or as it is expreſs'd in *French*; *Il eſtoit tenu de garnir ſa cour de Pairs* Opinions are Various as to the preciſe Number that is requiſite; ſome have thought that in *England* three at leaſt were neceſſary to the preſervation of a *Manor*, ſince no leſs Number admits of a caſting Voice, and conſequently in many caſes no Judgement cou'd be given. But my Lord Chief Juſtice *Coke* ſeems to think two to be ſufficient. " For (ſaies he) If all the Free- " holders Dye but one, Or if the Lord purchaſe all " the Freeholders Lands or paſs away or releaſe all the " Services of his Freeholders, the Lord in ſuch caſe " has but a *Manor* in name, becauſe the Freeholders are " wanting which are the Maintainers of a *Court-Baron*, " &c. Which Doctrine and Diſpute has likewiſe been agitated in every other Feodal Country, as appears in *Du Freſne's* Gloſſary verbo *Par*. Diſc. on Copy-holds ſs. 31.

As the Feudal poſſeſſion of Lands was a Method Invented by the Conquerors to ſecure their Conqueſts, Every Man of the Conquering Army (among whom the Lands of the Provincials were divided) was oblig'd by Virtue of his Tenure, to pay a Military ſervice to his General whom they had then dignify'd with the Title of King. Which Tenure, tho' it was the moſt burthenſome, was yet the only noble, as it diſtinguiſh'd, and as it were pointed out the Conquerors of a Country. The Conquerors cou'd originally truſt none but their own People, and the *Romans* or Provincials (which were Synonymous Terms) were treated with the Utmoſt contempt, and depriv'd not only of their Lands but alſo of the Liberty of bearing Arms.

Tit. of Honor p. 712–3.

Arms. And therefore, as Mr. *Selden* obſerves, the word *Gentleman* is deriv'd from the Latin Word *Gentes* and *Gentiles*, which had been us'd among the *Romans* by way of Reproach, to denote ſuch Perſons as had not the honour to be Subjects of their Empire, and which were afterwards adopted by their Conquerors, and made to ſignify the Aggregate body of Nobility.

All the Tenants of the King who held by the ſame Service, might in a general ſenſe be ſtyl'd *Convaſſalli Regis*. But as in proceſs of time the term of *Vaſſus* and *Vaſſallus* came commonly to denote only military *Tenants*, and as the Word *Barones* in the ſame manner came to be apply'd only to the chief Military *Tenants*, of the ſame ſuperior Lord, no Perſons were ſtyl'd *Convaſſalli quoad Regem*, or *Barons*, but only thoſe who were the Immediate Military *Tenants* of the Crown, that is, who held their Lands *per Baroniam* of the King as of his Crown, for tho' others might poſſibly have no other Lord but the King, and be therefore in ſome ſenſe *Tenants in Capite*; yet their ſervices were regardant to ſome *Manor* or great Seignory *in Manu Regis*, that is, were paid to the King, not as King but as Lord of ſuch or ſuch a *Manor* which cou'd be alienated, and conſequently their Services transfer'd and made payable to ſome other Lord; whereas a *Tenure* in chief of the King as of his Crown, cou'd not be granted, but was inſeparably annex'd to the Royalty; and upon this Circumſtance it was, *inter alia*, that the Dignity of a *Baron* was chiefly founded. But this leads naturally to the Conſideration of a *Tenant in Capite*, which upon this Occaſion it will be neceſſary briefly to explain.

Some Writers upon this Subject have thought *Baron* and *Tenant in Capite* to be as it were Synonymous *Terms*. And Indeed Sir *Harry Spelman* does ſo far incline to that Opinion as to ſay, " Ævo Henrici 2di quævis " Tenura in capite habebatur pro tenurâ per *Baroniam*. For which ſenſe of the Word he vouches the Statute of *Clarendon*, wherein *inter alia* it is enacted. " Archi- " epiſcopi, Epiſcopi & univerſæ perſonæ Regni Qui " de Rege tenent in Capite, habeant poſſeſſiones ſuas " de Rege ſicut Baroniam & inde reſpondeant, *&c.* Now what has contributed to lead People into this Notion is, that in truth during the Antient times, a great part of the *Tenants in Capite* were actually *Barons*, or *Tenants* per *Baroniam*, and a great part of the reſt were reputed to be ſo, and ſome of them, who really were

In Gloſſario.

were not *Barons* are yet ſo ſtyl'd ſometimes in old Hiſtorians, and upon their Authority our *Heralds* are apt to put them into their Liſts of antient *Peers*. The Old Hiſtorians were perhaps led into their miſtake, by the difficulty there often was in diſtinguiſhing between a *Tenure in Capite per Baroniam* and *per Servitium Militis*, which in ſome meaſure might ariſe from this, that the number of *Knights* Fees, comprehended in a *Tenure per Baroniam* was uncertain, and that the Service of them both, when perſonally paid, was in a great many particulars very much alike. But what has confuſed ſome modern Writers ſtill more, is a Notion they have entertain'd, that a *Tenure in Capite* was a diſtinct kind of *Tenure*, or rather Service different from all others, as Knight-ſervice is from Socage, *&c.* When as it is a Circumſtance only that may be true of all other Services whatſoever; for as the Term implys nothing but an Immediate Tenancy without any meſne between the Lord of the *Fief* and the *Vaſſal* who was ſeis'd of the Lands, it was applicable to a *Tenure* from any Lord whatſoever, and by any Service whatſoever. As appears from the *Formulare Anglicanum*, where *Alexander de Budicombe* ſold Lands held of *Hawiſe de Gurney* Lady of the *Fief*, to *Thomas Fitz Williams*, to whom the Lady gave Seiſin " Ad tenendum in *Capite* de me & de meis " Hæredibus ſibi & ſuis Hæredibus. But indeed the great Matter in theſe *Tenures in Capite*, whether of the King or of a Common Perſon, was, that they were always *Tenures* in Groſſe, fix'd to the Perſon of the Lord, and therefore not ſo lyable to be transferr'd over to any other Lord; whereas when Services were regardant to a *Manor*, they paſs'd to any other perſon by a Grant of the *Manor*. And perhaps to avoid this Inconveniency, a Tenant wou'd ſometimes pay a Fine to change one Lord for another, or a *Tenure* regardant to a *Tenure* in groſſe. Thus " Anſelmus Vic. Rhoth. r. c. " de dimidiâ marcâ auri, ut teneat in capite de " Epiſcopo Wintonienſi, terras quas tenuit de Thomâ " de Sancto Johanne.

Formul. Angl. nu. c.

Mag. Rot. 5. Steph. 13. a Berchescira.

But further there is no Foundation for thinking *Barony* and *Tenure in Capite* to be Terms Synonymous, becauſe we find thoſe Perſons rank'd among the *Tenants in Capite*, who were never imagin'd to be *Barons*: So that the Truth ſeems to be, that tho' every *Baron*, properly ſo call'd, was a *Tenant in Capite*, yet a *Tenant*

in

in Capite was not by Reaſon of his Tenure a *Baron*; for the Number of the *Tenants in Capite* was always encreaſing, but that of the Feudal *Barons* always decreas'd. It was common for Men to pay Fines to the King, that they might hold their Lands *in Capite* of him, without its being ever imagin'd, that they were thereby created *Barons*. "Osbertus Sylvanus, r. c. de Septem Marcis Argenti, ut teneat in Capite de Rege feodum j Militis quod fuit Willielmi filii Gaufridi ——— Johannes Eſturmit. r. c. de xx s. pro xl ſolidatis terræ tenere de Rege in Capite ——— Burgenſes de Lincolià r. c. de CC Marcis Argenti & iiij Marcis Auri, ut teneant Civitatem de Rege in Capite." Many other Inſtances might be added, but theſe are ſufficient; and I think that no Man can ſee any thing in them that looks like an Intention to erect a *Barony*. The Tenants, who perhaps held their Lands by different Services, and had Meſne Lords between them and the Crown, paid theſe Fines (without any Alteration of the Services they were to render) to get rid of their Meſnes, and become the immediate Tenants of the King.

Mag. Rot. 5. Steph. Rot. 1. b. Not. & Derb. Ibid. Rot. 2. a. Ibid. Rot. 12. a.

But as Tenure in chief might be of any Lord whatſoever, ſo likewiſe might it be by any Service whatſoever; as my Lord Chief Juſtice *Coke* obſerves, that a Man may hold of the King in Capite as well in Socage, as by Knight-Service: Which appears more fully in the Earl of *Marlbro*'s Treatiſe of Wards and Liveries, wherein he makes two diſtinct Chapters of *Tenure in Capite by Knight-Service*, and *Tenure in Capite by Socage*. Now Tenures in Capite, whether the Service reſerv'd be Knight-Service or Socage, are of two Sorts; 1. Where Lands are holden of the Perſon of the King and of his Crown, as of a Seignory diſtinct, in groſs, and paramount all other Seignories. ——— 2. Where Lands are held of ſome Honor or Manor that is in the Poſſeſſion or Seiſin of the Crown. And altho' that the Term of *Tenure in Capite*, in the Senſe now generally receiv'd, is moſtly applicable to the firſt of theſe, yet by reaſon that no Meſne Lord is in Fact between the King and the Tenant, it was formerly commonly apply'd to the other. My Lord *Marlbro'* indeed ſeems to think, that the Application of the Term in the ſecond Caſe was peculiar to thoſe Lands that were holden of ſome Honor that was antiently

Co. Litt. ff. 159.

tiently annex'd to the Crown, as *Barkinſted, &c.* but in Fact it was equally apply'd, to Lands that were held of any *County*, *Barony*, or *Manor*, which by Eſcheat or any other way whatſoever happened, to be in the Poſſeſſion of the Crown. As for Example, *Richard de Ockbeare* held the fourth Part of the Manor of *Rillaton in Capite* of the King, as of the County of *Cornwall*. " Cornubia ——— Richardus de Ockbeare ——— dat' " Domino Regi xii s vi d. de Relevio ſuo ——— de " quarta parte Manerii de Rillaton, quam ——— te- " nuit de Rege *in Capite* ut de Comitatu Cornubiæ in " manu Regis exiſtente." Tho' it ought to be obſerv'd, that *Coke* in his 11th Report does agree this to have been the antient Uſage of the Word, but that however (as he adds) of latter times, " Dicitur de " Rege ſolummodo terras teneri in Capite. Paſ. fines, &c. 9 Ed. 2. Rot. 113. b. x. Eſtwick's Caſe.

I ſhall not particularly examine the Differences there are between theſe two kinds of *Tenures in Capite*, as not being neceſſary to the purpoſes of the preſent Diſcourſe. But from what has been ſaid it will appear, that the Notion of *Tenure in Capite* has been very much confus'd, thro' the promiſcuous Application of the Term to both the above-mentioned Kinds of *Tenures in Capite*, without diſtinguiſhing which was particularly intended. Nor is it ſurprizing that thoſe Things ſhould be ſo obſcure at this Day, when whilſt they made a great Part of the Buſineſs of the Exchequer, and the Court of Wards ſubſiſted, very intricate Diſputes did happen concerning theſe Tenures. One of the Differences between theſe Tenures was, that perſonal Service was more ſtrictly requir'd of the *Tenants in Capite ut de Coronâ*, than of the *Tenants in Capite ut de Manerio, &c.* And therefore in the ninth of *Edw.* II. *Gerard de Wacheſham*, petition'd the King to be diſcharg'd from perſonal Service, and to be admitted to the Payment of *Eſcuage* Money, which was in lieu of it, upon a Suggeſtion that his Lands were held *in Capite*, as of the Honor of *Hagenet*. " Ad petitionem " Gerardi de Wacheſham ——— continentem, quod " licet ipſe teneat de Rege Manerium de Stanſtede in " Comitatu Suff. per ſervitium unius feodi Militis " ut de Honore de Hagenet & non de Coronâ, per " quod Servitium aliquod Corporale ——— facere " non debet, ſed Scutagium Regi ——— ſolvere te- " netur." Other Petitions to the ſame Purpoſe might Trin. R. 9 Ed. 2. Rot. 58. a. apud Madox.

be mention'd, upon all which Writs iſſu'd, directed to the Barons of the Exchequer, to ſearch the Book of Domeſday, the Book of Fiefs, and other *Memoranda* in *Scaccario*; and if it ſhould appear, that the Petitioners were *Tenants in Capite ut de Manerio, &c. & non ut de Coronâ*, that then the Prayer of their Petition ſhould be granted. But indeed in thoſe earlier Ages, they were ſo far from imagining that every *Tenure in Capite* of the King *ut de Coronâ* amounted to a *Barony*, and even if it did, ſo far were they from being ambitious of that Honor, that they apprehended nothing more than that the King (when any Honor eſcheated into his Hands) would change the *Tenure in Capite as of the Honor, to a Tenure in Capite as of the Crown*, and therefore it was made an expreſs Article in King *John*'s *Magna Charta*, that it ſhould not be done:

Mag. Ch. Reg. Jo. "Si quis tenuerit de aliquâ Eſcaetâ, ſicut de Honore "de Wallingford, &c. & de aliis Eſcaetis quæ ſunt "in manu Regis & obierit, Hæres ejus non dabit "aliud relevium, vel faciet aliud Servitium quam fa-"ceret Baroni, & ut Rex eodem modo eam teneat, "quo Baro eam tenuit.

I have been the more particular in explaining the Nature of a *Peer*, or *Baron*, and of a *Tenant in Capite*, becauſe it will enable us to apprehend what conſtituted an *Anglo-Norman Barony*. And I think it clear that every *Barony* was a *Tenure in Capite*, but then it is as clear that every *Tenure in Capite* was not *vice verſâ* a *Barony*. And ſince the Term *Tenant in Capite* is, or at leaſt was equally applicable to all Services, what diſtinguiſhes a *Baron* from all other *Tenants in Capite* cannot be the want of Meſnalty between himſelf and the Crown, for that is common to them all, but muſt be the reſervation of ſome particular Services, of a Superior nature to the others, and which were imply'd in the Phraſe *Tenere per Baroniam*.

As I do not propoſe to write a compleat Diſſertation upon *Baronies* in their full extent, I ſhall not enquire particularly what thoſe Services were, which were peculiar and eſſential to a *Tenure per Baroniam*, any further than is neceſſary to illuſtrate, what muſt be ſaid as to the Power of creating them.

A *Barony* was a *Tenure in Capite*, and immediately Subject to the Crown, as *Edward* 3. expreſs'd it. "Rex "*&c.* Sciatis quod *&c.* Richardus Comes Arundel

" ——— 24° Octobris——— fecit nobis Homagium pro Rot. Pat.
" Baroniâ ſuâ de Bromfeld & Yale ———quam idem 27 E. 3.
" Comes de nobis tenet in Capite tanquam Coronæ p. 3. m. 3.
" noſtræ Angliæ immediatè ſubjectam. And there-
fore it often happened in the Caſe of Amerciaments,
that when any Man thought himſelf aggriev'd by be-
ing amerc'd as a Baron, he wou'd plead that he was not
a Baron (tho' at the ſame time he wou'd admit himſelf
to be a Tenant *in Capite) quia nil tenuit per Baroniam.* Hiſt. Ex-
As *Thomas de Furnival*, mention'd by Mr. *Maddox*, did. checq.
" Quia dicit quod non eſt Baro, neque tenet, nec un- p. 370.
" quam tenuit aliqua tenementa in Com' prædict. per
" Baroniam, nec per partem Baroniæ: Dicit enim
" quod tenet Manerium de Sheffeld de Domino Rege
" per Homagium tantum ——— Manerium de Wyrk-
" ſop & Greſthorp———de Rege ut de Honore de
" Tyckhull, &c.

It has been already obſerv'd, that the whole of Parliamentary Buſineſs, is reducible to the Heads of either Advice or Conſent. The firſt of which is to be conſider'd as a Feudal Service payable to the King as Superior Lord of their Fiefs: The ſecond is Extra-feodal, and depends upon thoſe Principles of Liberty that were common to all the *Gothick* Nations. For every *Tenant per Baroniam* did Homage to the King, by Virtue of which he was oblig'd, whenever Summon'd, to attend him. The Profeſſion of Homage did comprehend in it, that the Tenant was oblig'd, *inter alia*, to ſerve his Lord with his Councel and Advice. And for this reaſon all the antient Writs of Summons, did run in theſe terms " Vobis mandamus fide & Homagio " quibus nobis tenemini. Which Words Sir, *Harry Spelman* and my Lord Chief Juſtice *Coke*, think to be In Gloſſario. relative only, to the *Feodal Barons*. And the Chief Juſtice 4 Inſt. p. 5. adds, that the reaſon why the *Barons* are now ſummon'd only in *fide & Ligeantiâ*, is becauſe that there are no *Feudal Baronies* extant, tho' it is certain that ſeveral *Barons* who were *Feodal*, have been alſo ſummon'd *in fide & Ligeanciâ*. So that tho' a Summons in *Homagio* is an Argument that they were *Feudal Barons*, a Summons *in fide & Ligeanciâ* is no Proof they were not ſo.

Whatever Notions are now entertain'd of an Attendance in Parliament as an Honor, a Privilege, *&c.* in the Earlier Ages of our Monarchy, it was look'd upon in a quite different light; and was eſteem'd to

be a Service, a Burthen, incident to the Tenure of their Lands, from which many were desirous to be deliver'd. The Clergy, who now think the *Baronies* annex'd to their Bishopricks to be advantageous, did Originally complain of them as a Burthen and Imposition upon the Church. " Rex Willielmus pessimo
An. 1070. " usus Consilio (says *Matthew Paris*) Episcopatus & " Abbatias omnes quæ Baronias tenebant in purâ & " perpetuâ Elemosynâ sub servitio statuit militari. And therefore when they were Summon'd to Parliament, many of them wou'd Petition to be discharg'd from their Attendance, upon a suggestion that they held no Lands *per Baroniam*. My Lord C. J. *Coke* affirms that a Regular ought of necessity to hold *per Baroniam*, before he cou'd be oblig'd to serve in Parliament, since if he did not, he cou'd lawfully refuse his Attendance, and goes so far as to say, that even the Charter of *Henry* 8. to *Banham* Abbot of *Tavistocke* was void in Law, because he was not a *Tenant per Baroniam*. But the Consideration of what he further adds, that a Layman was oblig'd to attend when Summon'd, whether he was a *Tenant per Baroniam* or not, must be reserv'd till I come to treat of Barons by Writ. In the mean time I shall make some Observations upon the Original manner of creating *Barons by Tenure*, by which the Reader may form some Judgment how far the King had it in his Power, to encrease *ad libitum* this first Species of Peers.

Selden's tit. Hon. 604. *a.* 7. 4. Inst. 44-5.

1. Baronage by Tenure is founded upon the Feudal Law, as it was understood by the *Normans* for some time after the Conquest. At which time the Conqueror took into his own Hands (as his share of the Plunder) all the *Demesne* Lands of the Crown, and whatever had belong'd to, or been in the Possession of, *Edward* the Confessor at the time of his Death; the rest he divided amongst his Army, the greatest part of which had follow'd him with no other View than to make their Fortunes. And indeed he was very liberal to many of them, as for Instance, the whole County of *Chester* was granted to *Hugh Lupus*. *Robert* Earl of *Moreton* in *Normandy* and of *Cornwall* in *England*, had a grant of no less than 793 Manors. *Alan* Earl of *Brittaigne* and *Richemonde*, 442. and *Geofroy* Bishop of *Constance* had 280. These Grants of the Conqueror, tho' they were made as Rewards for Services, must not however

however be attributed to the greatneſs of his Generoſity, but to the Neceſſity of his Affairs, ſince without it, the Officers of his Army wou'd undoubtedly have mutinied, for they did never look upon them as Matters of Grace but of Right. At leaſt the great Earl of *Warren* thought ſo, when he produc'd his Sword as his Warranty for his Land, in Anſwer to a *Quo Warranto* brought againſt him, adding, " That *William* the " Baſtard did not Conquer the Kingdom himſelf, but " that his Anceſtors were Joint Adventurers in the " Enterpriſe, and Sharers and Aſſiſtants therein. Dugd. Bar. Vo. 1. p. 79.

The Services reſerv'd upon theſe Grants, are the Foundations of *Baronage*, and were firſt enacted by the Conſent of the Grantees themſelves, to which they were eaſily induc'd, thro' the Neceſſity there was of them for the Security of their new Acquiſitions, but to ſpeak in Modern Language, Feudal Services, and conſequently *Feudal Barons*, were firſt Inſtituted in Parliament. And indeed it was natural that the Officers of his Army who had obey'd him as their General, ſhou'd be conſulted as to what Services they wou'd pay to him as their King, after that they became the moſt conſiderable Land-holders in the Kingdom. It was natural likewiſe that the Conqueror himſelf, ſhou'd upon ſuch an Occaſion ask their Advice and Conſent, ſince in ſo doing he did but follow the Steps of his great Anceſtor *Rollo*; for Feudal Services were in all probability, firſt eſtabliſh'd in *Normandy* by him, with the conſent of the Officers of his Army, by whoſe Aſſiſtance he had Conquer'd that Dutchy, if we may rely upon the Authority of *Dudo Sc'tus Quintinus*, who wrote in the Time of *Richard* the Firſt Duke of *Normandy*, and 200 Years before our Conqueſt, " Terram ſuis Comitibus & ſuis fideliter funi- " culo diviſit; ſecuritatem omnibus Gentibus in ſuâ " terrâ manere cupientibus, fecit. *Jura Legeſque ſem-* " *piternas, voluntate Principum ſancitas & decretas*, ple- " bi Indixit." But it is not ſufficient to ſay that it is natural to ſuppoſe, theſe Military Tenures to have been firſt founded by a common Conſent; Let me further add therefore, that our oldeſt Authors do alſo affirm it. *Bracton* in plain terms affirms them to have been inſtituted at the Conqueſt, " Regale ſervitium " quia ſpecialiter pertinet ad Dominum Regem & non " ad alium, & ſecundum quod in Conqueſtu fuit ad- " inventum. de Mor. Norman. Lib. 2. Lib. 2. ca. 16.

" inventum." In which Words he ſeems to refer to the 58th Law of *William* I. " De Clientum ſeu Vaſ-
" ſallorum præſtationibus,---wherein the Conqueror himſelf owns them to have been eſtabliſh'd by common Conſent. " Statuimus etiam & firmiter præci-
" pimus ut omnes Comites & Barones & Milites, & " Servientes & univerſi Liberi Homines totius Regni
" noſtri prædicti habeant & teneant ſe ſemper benè
" in Armis & in Equis ut decet & oportet, & quod
" ſint ſemper prompti & bene parati ad ſervitium
" ſuum integrum nobis explendum & peragendum
" cum ſemper opus affuerit, ſecundum quod nobis de
" feodo debent & tenementis ſuis de Jure facere, &
" ſicut illis ſtatuimus *per commune conſilium totius Regni*
" *noſtri prædicti*, & illis dedimus & conceſſimus in feo-
" do Jure Hæreditario."———My Lord C. J. *Hales* obſerves upon theſe Laws of *William* I. that they were not Impos'd *ad libitum Regis*, but that they had a Parliamentary Authority, which he ſuppoſes to have been in the fourth Year of his Reign, in a Parliament as ſufficient and effectual, in his Opinion, as was ever held in *England*. Which is ſupported by the Authority of *Hoveden*, who in the Life of *Henry* II. ſpeaking by way of digreſſion of *William* I. ſays, that " quarto
" anno Regni ſui, conſilio Baronum ſuorum fecit
" ſummoneri per univerſos Conſulatos Angliæ, *&c.*
" Electi igitur de ſingulis totius Patriæ Comitatibus
" Viri duodecim."

Hiſt. of Law, p. 108.

Hoveden.

Altho' the Poſſeſſion of Lands in thoſe Times was attended with very great Burthens, ſuch as Marriage, Ward, Relief, *&c.* Yet it is not ſurprizing that the *Norman* Chiefs ſhou'd agree to them, ſince they were the ſame Terms and Services upon which they held their Lands in *Normandy*. What *Polidore Virgil* Imagines, *viz.* that theſe Services were introduc'd by *Henry* III. is abſurd, ſince it is manifeſt from the *Cuſtumiere de Normandie*, in the Chapters, " *de*
" *garde dorphelins, de relief, de aides chevels*, &c." that they were in ſome Meaſure practis'd in *Normandy* before the Conqueſt, and indeed in moſt Parts of *France*, and the Conqueror himſelf during his Minority was in Ward to the then King of *France*. But it wou'd extend this Treatiſe to too great a Length, if I ſhou'd purſue this Subject any further, I ſhall content my ſelf therefore to obſerve, that this Similitude of Tenures

Lib. 16. Cap. 23, 24, 25.

nures to what they were in *Normandy* (where like as in *England*, none but thoſe who held in chief of the Duke, as of his Duachy, had a perſonal Right to ſit in the Aſſembly of their States) was ſo well underſtood at that time, that an Entry in Domeſday is made, that ſuch a one held Lands, according as it was us'd in *Normandy*. Domeſ-
"Habet ——— in eodem feodo de W. Comite Radul- day.—
"pho deLimes 50 carucat. terræ ſicut ſit in Normannia.

And in *Scotland* likewiſe it ſeems to have had a Parliamentary Original; "Indicto ad Sconam Con- Lib. 6.
"ventu (ſays *Buchanan* in the Life of *Malcolm* II.)
"omnes Agros Regios eis diviſit——Nobilitas con-
"trà Regi conceſſit, ut cum eorum aliquis moriretur,
"Liberi ad vigeſimum primum ætatis annum in Tu-
"tela Regia eſſent." This Account, if it be true, ſuppoſes *Ward* to have been introduc'd into *Scotland* ſixty Years before our Conqueſt; *Malcolm* II. beginning his Reign *anno* 1004. Perhaps there may be ſome Miſtake in it; for as it is probable the *Scotch* did receive many of their Feudal Cuſtoms from *England*, as we did from *France*, and *Buchanan* himſelf ſpeaking of this Cuſtom in particular, admits it to have been borrow'd from the *Engliſh*; "Hunc morem potius ab An- Ubi ſuprà
"glis & Danis acceptum credo:" It is not improbable but that what is ſtoried of *Malcolm* II. as to this Alteration of their Law, ought rather to be underſtood of *Malcolm* III. who liv'd quite thro' the Conqueror's Reign, and firſt introduc'd the Feudal Titles of Honor, as of *Earl*, *Baron*, *&c.* into that Kingdom.

But be that as it will, this ſeems to be more than probable, that theſe *Tenures* were introduc'd into *England* by Common Conſent, or by Parliament. Nor was the Number of *Tenants in Capite* at firſt ſo numerous, but that they might well all meet together for the Diſpatch of any Buſineſs that concern'd them all; for in the Time of *William* the Conqueror there were not quite ſeven hundred Lay *Tenants in Capite*; who, together with the Biſhops, Abbots, *&c.* under the King, held all the Lands in the Kingdom, and of whom all other Perſons whatſoever held. Now of theſe *Tenants in Capite*, the reſerv'd Service of the greateſt part of them was but *Petit Serjeanty*, and conſequently the Number of thoſe, who held *per Comitatum vel Baroniam* could not be very large. Domeſ-
day.

But

But beſides this, that the firſt *Barons*, or rather the firſt *Baronial Services*, were originally inſtituted by Common Conſent, that is, in Parliament, there is another Conſideration to be added, which ariſes from that Portion of Power which the antient Kings of *England* had over their Crown-Lands, or Demeſne; for it was by Grants of them only, that it was poſſible to encreaſe the Number of *Feudal Baronies*; ſince, as has been before obſerv'd, at the Conqueſt, all the other Lands of *England* were either portion'd out among the Followers of the *Norman*, or elſe the Poſſeſſion confirm'd to thoſe old *Saxon* Proprietors, who had not been in Arms againſt him, with this Difference only, that new Services, *&c.* were reſerv'd, which were firſt eſtabliſh'd by the *Normans*; and to which perhaps during their *Saxon* Government they had not been oblig'd.

In this Diſtribution of Lands ample Proviſion was made for the Support of the Royal Dignity; for no leſs than 1422 Manors or Lordſhips, together with other Lands ſcatter'd up and down in the Counties of *Middleſex*, *Salop*, and *Rutland*, were appropriated to the Crown, over and above ſome Quit-Rents, and the Services that were paid out of thoſe which were granted away. *Ordericus Vitalis* ſays, that the ſettled Rents of *William* I. amounted to no leſs than the Sum of 1061 *l.* 10 *s. per Diem*; which, ſuppoſing Money to have been ten times the Value it is now, is near four Millions ſterling *per Annum*; "Ipſi Regi 1060 Libræ "Sterilenſis Monetæ Solidique triginta & tres Oboli "ex juſtis redditibus Angliæ per ſingulos Dies red-"duntur." I think it may be here obſerv'd, that this Author relates this Paſſage of the Royal Revenue in the ſame Year in which the Laws of *William* I. and Feudal Services were eſtabliſh'd, *viz. Anno* 1070, the fourth Year of the Conqueror's Reign, which began in the Year 1066. *Forteſcue* therefore had ſome Reaſon to ſay, that the King of *England* at firſt had the greateſt Revenue of any Prince in *Europe*. Of this Revenue, ſpeaking of the Article of *terra regis* in Domeſday, Sir *Robert Cotton* ſays, that our Forefathers thought it impious to alienate it.

Ord. Vit. a. 1070. p. 523.

De Dom. Reg. & Polit. ca. 11.

Op. Poſt. p. 179.

And as to the Queſtion, whether it was ſo, or not? The Reader muſt judge, according as he thinks, it either a good or bad Conſequence to ſay, that what

was

was part of the Coronation-Oath, was alſo part of the Law; And that was antiently to this Purpoſe, " That he ſhall keep all the Lands, Honors, and " Dignities righteous and free of the Crown of *Eng-* Coll. of " *land* in all manner holy, without any manner of Oaths, " Miniſhments, and the Rights of the Crown hurt, p. 1. " decay, or loſſe, to his Power ſhall call again into " the antient Eſtate." Which Doctrine agrees with all our antient Lawyers. For *Fleta* upon this Occaſion relates, that all the Princes of *Europe* in the fourth Year of our *Edward* I. bound themſelves in a ſolemn Meeting at *Mont-Pellier* to revoke all Grants which had been made of their Crown Lands. Which Story (tho' it is by *Selden* demonſtrated to be impoſſible to have happen'd) does yet ſtrongly ſhow the Sentiments of that Author. " Res quidem Coronæ ſunt Lib. 3. " antiqua Maneria Regia Homagia Libertates, & hu- c. 6. ff. 3. " juſmodi quæ cum alienantur, Rex ea revocare " tenetur, ſecundum proviſionem omnium Regum " Chriſtianorum apud Montem-Peſſoloniam, Anno " Regni Regis Edvardi filii Regis Henrici quarto ha- " bitam." And in another Place he expreſly affirms the Law ſo to be; " Antiqua Maneria vel Jura Co- Lib. 1. " ronæ annexa, Regi non licebit alienare; ſed omnis c. 8. " Rex Coronæ ſuæ alienata revocare tenetur." And therefore he in another Place ſays, that the Officers of the King were ſworn never to conſent to any Alienation. " Item quod nihil conſentient alienari, de Lib. 1. " hiis quæ pertinent ad antiquum Dominicum Coronæ c. 17. " Regis." And *Bracton* to the ſame purpoſe ſays, ff. 17. that " Eſt res quaſi ſacra, res fiſcalis quæ dari non po- Lib. 2. " teſt, nec vendi, nec ad alium transferri a Principe cap. 5. " vel a Rege regnante. And *Britton*, in the Name of *Edward* I. ſays, " Rois auſſi ne pourront rien aliener cap. de " en droit de lour Corone ne de lour Royaltè que il Douns. " ne ſoit repealable per lour Succeſſours." But this Law was not particular to *England*, ſince it prevail'd in all the Feudal Countries. *Hottoman* affirms it to have been the antient Law of *France*. " In Gallia quidem Quæſti. " noſtra Rex ſine publico Gentis concilio, quod trium Illuſt. " ordinum Conventus adpellatur, nihil nec alienare, " ac ne oppignorare quidem poteſt." It is needleſs to inſert more, ſince I hope my Reader will believe it eaſy to prove it to have been the Law of all other Countries.

As this Law is now antiquated not only in *England*, but in all other Nations, what has been ſaid, can relate to the Law, only as it ſtood for about 200 Years after the Conqueſt, during which time, it is agreed that all our Barons were Feudal. But then it obviouſly follows, that during that time, it was not poſſible for the Crown to increaſe the Number of Baronies: For all the Land of *England*, except what was reſerv'd in Demeſne, being granted out to be held by different Services, as *per Baroniam*, *per Servitium Militis*, *&c.* the Crown had no Land to diſpoſe of, but only ſuch as ſhou'd happen to Eſcheat by the Death of any of thoſe Grantees without Heirs, or Forfeiture, *&c.* So that in ſhort this Obſervation amounts to this, that no *Feudal Baron* cou'd be without Lands, and that the King had no Lands to Grant but Demeſne, and that they being by Law unalienable, it was only the Power of regranting Eſcheats that was in the Crown; which is exactly conſonant to the Feudal Law, as expreſs'd by *Molinæus*, who after aſſerting that a King cou'd not alienate his Demeſne Lands, adds, "Feuda, Subfeuda, "& alia quæcunque immobilia ab eodem Domanio "dependentia, quæ ad Regem Jure Confiſcationis vel "Commiſſi deferuntur, poſſunt libere per eum alie-"nari & in perpetuum concedi.

Tit. de feod. S. 43. n. 184.

Upon this Occaſion it will illuſtrate what has been ſaid, to obſerve, that when Lands which were *Baronies* eſcheated into the King's Hands, the *Barony* was not diſſolved, but ſubſiſted as a *Barony in manu Regis*, and as ſuch were to be granted over. Lands held in Antient Demeſne, when they devolv'd into the King's Hands became Frank-Fee, and as ſuch were accounted for by the Fermours. But *Baronies* always retain'd their Name and Nature, and as ſuch were accounted for in the Exchequer: As for Example, "Willielmus le Puher & "Hugo Pincerna r. c. de L *l.* & viii *s.* de firmâ *Hono-"ris* Willielmi de Curci de parte illâ quæ eſt in manu "Regis." So that tho' the King cou'd not encreaſe the Number of *Baronies*, it ſometimes happen'd that he cou'd the Number of *Barons*, by a Perſon's dying without Heirs, *&c.* who was poſſeſs'd of ſeveral *Baronies*, which in ſuch caſe might be granted to ſeveral Perſons.

Mag. Ch. Joan Reg. ſupra citat. 21 Aſſiſ. pl. 13. Madox Cap. de Eſcheats, &c. Mag. Rot. 19 H. 2. Rot. 5. a.

3. It

3. It may be alſo further obſerv'd, that *Honor* and *Barony* were formerly uſed as Synonymous Terms. Sir *Harry Spelman* ſays, "Honor igitur ab Anglo-Nor- In Verbo.
"mannis dictum videtur, unius cujuſque Majoris Ba-
"ronis feodale Patrimonium ſeu *Baronia*." And *Gervaſius Tilburienſis* ſpeaking of the Manner of accounting for the Ferms of Eſcheats, ſays, that if the Land accounted for be a *Barony*, it ought to be entituled, the Account of ſuch an *Honor*. "Verum dum in manu In Cap. de
"Regis, de hoc ſic ſcribetur in Annali; Ille Viceco- Excedenti-
"mes reddit Compotum, de firma illius *Honoris*, ſi bus.
"*Baronia* eſt." Now in *Croke's Elizabeth*, it is agreed P. 38.
per Cur', That a Manor cannot at this day be made by Morris *v.*
the Crown; with whom my Lord *Coke* agrees in his Smith.
Diſcourſe concerning Copy-holds, *& alibi*. And in
Croke's Caroli it is likewiſe agreed, that an *Honor* conſiſts of many Manors united together: from whence Seagood *vtr.* Hone
it follows, that as the Crown cannot create a Manor, & Ux'.
ſo likewiſe it cannot create an *Honor*, and conſequently
no Power but that of the King in Parliament can create a *Barony*. Conſiſtent with which Notion of the Law, *Henry* VIII. who cannot juſtly be ſuſpected of being a Prince willing to diminiſh his Prerogative, did derive his Exerciſe of this Power from an Act of Parliament; for in 31 *Henr.* 8. the King's own Manor of Cap. 5.
Hampton Court, was by Act of Parliament made an *Honor*; by which Act the Manors of *Byſlete* and *Weybridge* in *Com' Surr'* and ſeveral other Manors, are made part and parcel of that *Honor*. So likewiſe in 33 *Hen.* 8. other Acts to the ſame purpoſe paſs'd in favour of the Manors of *Ampthil* and *Grafton*, by which they were made *Honors*. And I believe that no Inſtance can be given from the Conqueſt unto this day, of any *Honor*'s being erected otherwiſe than in Parliament.

4. But to conclude this Point of *feudal Barons*, I ſhall laſtly obſerve, that by Intendment of the antient Common Law, *Every Baron was feudal*, and many of their Privileges were founded upon that Suppoſition. As for Inſtance, their Perſons are free from Arreſts Coke 12.
at the Suit of a Subject, nor will a *Capias* or *Exigent*, Rep.
&c. lie againſt them. The plain reaſon of which *Counteſs of*
Privilege is, that the Law ſuppoſes them to be of Salop's
Fortunes ſufficient to anſwer all Demands, which In- *Caſe*.
tendment of the Law does ſeem obviouſly to be

founded upon their being conſider'd in Law as *feudal*, and that conſequently there wou'd be always upon the *Demeſnes*, &c. of their *Baronies* ſufficient to diſtrain for the Satisfaction of any Debt. Another Privilege is, that they are not liable to ſerve on Juries. But the Writ for their diſcharge, does ſuppoſe every Perſon who claims the Benefit of it, to be an actual Baron, ſince it begins " Rex, *&c.* Quia Barones " Regni noſtri, *&c.*" And accordingly the Judges did antiently ſuppoſe every *Baron* to hold *per Baroniam*, or at leaſt *per partem Baroniæ*. As for Inſtance in relation to this very Point of their being diſcharg'd from ſerving on Juries, 22°. *Ed.* 3. " Puis un fut chal' purc' " qu'il fut a Bannier' & non allocatur car s'il ſoit a " bannier' & ne tient pas par Baroni, il ſera in l'aſſiſe." And at another Time, Sir *Ralph de Everden* brought a Writ for his diſcharge. And *Belknap* " luy oppos' s'il " tient per Baroni——& s'il avoit tout ſon temps " ven' au Parl' come Baron duiſt venir. Et il dit qu'il " tient per certein part d'un Baroni——il fut diſ- " charge." My Lord *Coke* explains, *ne tient pas per Baroni*, &c. as if it was neceſſary, that beſides his Tenure he ought to be a Lord of Parliament; But it ſeems probable that this Privilege was not peculiar to an Attendance in Parliament, but Incident to a Tenure *per Baroniam*. For altho' that after the 49. *H.* 3. when the *Majores Barones* were ſeparated from the leſs, no *Barons* had a Right to come to Parliament, but only thoſe to whom Writs were directed, yet the leſſer *Barons* did for ſome time preſerve all the other Privileges that were incident to their Tenure. Of which this is one, and this Caſe is a Proof of it, for this Sir *Ralph de Everden*, who as the Book ſays was (*per bon aviſe*) diſcharg'd from ſerving on the Aſſiſe, never was a Lord of Parliament, nor does it appear by the Liſts of Summons, that any Man of that Name was ever ſummon'd to Parliament. This Caſe is the more remarkable, becauſe it is always referr'd to by the Generality of our Lawyers upon a Suppoſition that he was a Lord of Parliament. Particularly by *Doddridge*, who likewiſe commits the ſame Error in relation to *Theobald de Bordmor*, one of the *Marcher Barons*, who being Impannel'd upon a Jury claim'd this Privilege. But no Man of that Name was ever ſummon'd to Parliament, tho' in fact he was a *Baron*, that is, a

Regis. Br. p. 179. b.

22 *Ed.* 3. fo. 18. *a.*

48. Aſſi. p. 6.

Treatiſe of Nobility, p. 39.

Tenant

Tenants per Baroniam, for the Truth is, that tho' every Lord of Parliament was a *Baron*, yet from the Time of *Henry* III. every *Baron* was not a Lord of Parliament. And this Diſtinction leads us to the Conſideration of the ſecond Species of *Peers*, and that is *Peers* by Writ.

The common Notion of *Barons by Writ*, is chiefly founded upon the Authority of Sir *Edward Coke*, who does ſay that if the King calls any Lay-man to the Upper Houſe of Parliament generally by his Writ, that he is thereby, provided he once ſits, in Conſequence of it, created a *Baron* and *Lord of Parliament* to him and his Heirs for ever. I particularly uſe the Word *Lay-man*, becauſe in another place he affirms, that a Lay-man when ſummon'd was oblig'd to attend, but that a Regular was not, unleſs he held of the King *per Baroniam*.

1 Inſt. fo. 9. b. and fo. 16. b.

4 Inſt. p. 44.

The Number of the *Tenants per Baroniam*, was not near ſo Numerous as it has been by ſome imagin'd (deceiv'd by ſuch Expreſſions as *Infinita Multitudo Baronum*, *Numeroſa Nobilitas*, &c.) Since, as *Matthew Paris* relates, King *Henry* III. when he was at St. *Albans* caus'd a Liſt to be made of all the *Baronies* in *England*, and they amounted but to the Number of 250, according to the Edition of 1571, (tho' *Cambden*'s Manuſcript mention'd in his *Brittannia* reads 150) "Nominavit idem quoque Dominus Rex & Memoravit "omnes Angliæ Baronias quarum ei occurrit Memo- "ria invenitque ducentas & quinquaginta." Now if it be conſider'd that many of theſe Baronies might eſcheat into the King's Hands, and that many of them might alſo be in the Poſſeſſion of one Nobleman, *&c.* it does ſeem very probable, that the Number of Lords cou'd not at any Time have been greater than it now is. And if it be alſo conſider'd, that the Number of the King's *Tenants in Capite* in Domeſday did not (as is Above mention'd) exceed Seven Hundred, and that the greateſt part of them held by Inferior Services, as *Petit-Serjeanty*, &c. it will not be reaſonable to ſuppoſe there ever cou'd be more than 250 *Tenants per Baroniam*. Which agrees with what appears in the *Rolls* about five or ſix Years after. When Writs of Summons were ſent to all the *Barons* of *England* to attend the King againſt the *Welch*, *cum Equis & Armis*; Of the Temporal Barons one hundred and thirty three,

Matt. Paris.

Selden-- tit. Honor 592.

three, and of the Spiritual fifty were ſummon'd *ad habendum ſervitium ſuum*. During the Time that the *Baronage* ſubſiſted wholly upon a Feudal Foot, it is obvious that every Man who held *per Baroniam Integram* had a right to be ſummon'd to the great Councils of the Nation. But as a great Number of them grew weary of their Attendance, becauſe of the trouble and expence of their Journies, they were in Proceſs of Time neglected to be ſummon'd. And at laſt the *Barons* of the Antienteſt Foundation, who had the greateſt Revenues, and conſequently the greateſt Power, were ſtil'd *Majores Barones*. For (as has been already obſerv'd) the King had a Right to grant over all eſcheated Baronies, but as he was not perhaps oblig'd to grant them upon the ſame Services, it was frequent to reſerve more burthenſome Services (as *e. g.* a greater Number of Knights, *&c.*) upon the new Infeoffment, than the firſt Granteè had been oblig'd to perform. Which Circumſtance was likewiſe common to the *Tenants in Capite by Knights-Service* only, as well as to the *Tenants per Baroniam*. And from hence aroſe the difference between the *feoda Veteris & Novi feoffementi*, which are diſtinguiſh'd in the account of the Aid *pur fille marier*, that was granted to *Henry* II.

Lib. rub. in Scaccar. " Reginaldus de Warrennâ *r. c.* de *ix l.* & *x s.* de Mi-
" litibus Honoris de Wurmegai. In *th. l.* & *Q. e.*
" Idem debet *xl. d.* de *novo feoffamento*." But in order to collect this Aid the better, All the King's *Tenants in Capite*, by what Service ſoever, were oblig'd to tranſmit Certificates into the Exchequer of what Fiefs they held, which by a general Name were call'd *Chartæ Baronum*, tho' they were not all Barons, as *e. g.* " Char-

Lib. rub. " ta Albani de Hairun Domino ſuo Excellentiſſimo
" Henrico Regi Angliæ Albanus de Hairun ——
" notifico quod in Hertfordſcirâ feodum unius Miſ-
" tis de Veteri feoffamento, de Vobis principaliter
" teneo, & quod de novo feoffamento nichil habeo.

But it is not only that the new Infeoff'd *Barons* were not ſo rich as thoſe of the antient Date, but the Old *Barons* thinking to aggrandize their Dignity by not ſuffering the Grantees of theſe Eſcheated *Baronies* to be ſummon'd to Parliament, as *Barons* indifferently with themſelves, did in ſome Parliament (as Mr. *Selden* judges) that preceded the Grand Charter, obtain a Law, that only the *Majores Barones* ſhould be ſummon'd

mon'd for the future. But indeed this Inclination of the *Greater Barons* ſhew'd itſelf ſtrongly, during the Reign of King *John*; in whoſe Great Charter, as printed in *Matt. Paris*, and alſo in the *French* Copy publiſh'd by Monſ. *D' Herouall*, a Clauſe is inſerted to this Purpoſe. "Ad habendum Commune Concilium "Regni, faciemus ſummoneri Archiepiſcopos, Epiſ-"copos, Abbates, Comites, & *Majores Barones* Regni "ſigillatim per literas noſtras." Tho' I think it may be here obſerv'd, that this Clauſe is not in that Charter of King *John*, which I have ſeen under the Seal of that King in the Cuſtody of the late learned Biſhop of *Sarum*.

And this was the firſt Foundation of *Barons* by Writ (as they are now call'd) tho' it is plain from what has been ſaid, that the Writ was not by theſe Laws made any ways eſſential to a *Barony*, but only that tho' they were *Barons*, they ſhould not have a Right of appearing among the Greater *Barons*, becauſe they were not particularly ſummon'd: So that it was not their *Barony*, but their Right of Voting in Parliament that depended upon the Writ. But this Regulation of the *Peerage*, or *Barons of Parliament*, was not compleated in the Reign of King *John*. His Son *Henry* III. (after the entire Defeat of the *Barons* at the Battle of *Eveſham*, thereby putting himſelf in a Condition to treat the greateſt part of them as Rebels) put the finiſhing Hand to this Regulation, which was afterwards obſerv'd by *Edward* I. and ſome of his Succeſſors. And here it muſt be obſerv'd, that *Henry* III. did not by his Law propoſe to eſtabliſh a Prerogative of creating any Perſon a *Baron of Parliament* by his Writ, whether he was a *Tenant per Baroniam*, or not. On the contrary, he left the being or not being a *Baron* upon the Foot he found it, introducing only this Rule for the future, *viz.* That none of the *Barons*, or *Tenants per Baroniam* ſhould have Voice in Parliament, but thoſe only to whom he ſhould direct a Writ of Summons; for ſo are the expreſs Words of the Manuſcript cited by *Cambden*: "Ille enim (Rex "ſcilicet Henricus III.) poſt magnas perturbationes "& enormes vexationes inter ipſum Regem, Si-"monem de Monteforti & alios Barones motas & ſo-"pitas, ſtatuit & ordinavit, quod *omnes illi Comites & "Barones Regni Angliæ, quibus ipſe Rex dignatus eſt, Bre-* In Britan.

"*via*

" *via Summonitionis dirigere venirent ad Parliamentum* " *ſuum, & non alii,* niſi fortè Dominus Rex alia illis " brevia eis dirigere voluiſſet." This Law was probably made in the Parliament held 49 *Henry* III. immediately after the Battle of *Eveſham*, to which were ſummon'd of the Spiritualty no leſs than 36 Priors, and 65 Abbots, beſides the Biſhops, five Deans, and the Maſter of the Temple, but of the Temporalty not 30— by whom the Vanquiſh'd *Barons* were forfeited, and their Lands ſeiz'd into the King's Hands. But this Severity did not quiet the Nation, the Sufferers being too many to be us'd with ſuch Rigor. The diſtreſs'd Barons again took Arms, and the Year following compell'd the King to agree to a more reaſonable Compoſition, by which they were reſtor'd to their Eſtates upon the Payment of moderate Fines. And accordingly we find, in the very next Writs of Summons that are extant, a greater Number of Temporal Lords ſummon'd, *viz.* 12 Earls, and 53 Barons.

dictum de Kenelw.

Rot. cl. 23. Ed. 1. m. 9. dor.

Having in this Manner explain'd what, as I apprehend, gave the firſt Occaſion for the Term of *Barons* by Writ, in order to judge more clearly what Operation in Law this Writ could antiently have, it muſt be conſider'd, that it could not poſſibly be directed but to three Sorts of Perſons; that is, either to ſuch as were *Tenants in Capite per Baroniam*, or to ſuch as were only *Tenants in Capite by Knight-Service*, &c. or elſe to ſuch as were not the immediate Tenants of the Crown at all. And as to the firſt of theſe, they were oblig'd to attend if ſummon'd, and as they were already *Barons* by their Tenure, when they were in Parliament, they had undoubtedly in Conſequence of their Writs a Right to vote in all Queſtions whatſoever, *&c.* As to the Second, they alſo by Virtue of the Oath of Homage, which every Military Tenant made to his Lord, were oblig'd to attend when ſummon'd; but then, when they were in Parliament, it may be doubted, whether they had more than a deliberative Voice of Councellors, or, as it is now expreſs'd, whether they were more than as Aſſiſtants to the Houſe of Lords. And as to the third, they were not by Law oblig'd to obey the Writ; but yet, if they voluntarily choſe to attend, they, like the ſecond, were in all Probability no otherwiſe than as Aſſiſtants to the Houſe.

As

As to the first of these three Sorts of Persons, the Question is not so much, whether they were not, after the Receipt of their Writ, intituled to all the Privileges of Parliamentary *Barons*, as whether there were in Fact, from the Time of *Edward* I's Accession, any Persons who were *Tenants per Baroniam*, and yet had not a Right to demand a Writ of Summons to Parliament. *Elsynge* in his Manner of holding Parliaments does observe (and truly) that it appears by the *Inquisitiones post mortem*, remaining in the Tower, that very much Land was anciently held *per Baroniam*, by Persons who were never summon'd to Parliament; but his Remark, that they were therefore never reputed *Barons*, is not well founded, as appears from the above-cited Cases of Sir *Ralph de Everden*, and *Theobald de Bordmor*, and the *Cornwalls* of *Shropshire*, of whom Sir *Harry Spelman* observes, that they were Unparliamentary *Barons*: "Sed Villa Burford in Com. Salop. re- "peritur per Inquisitionem capt. anno 40 *Ed.* III. te- "neri de Rege ad inveniend' quinque homines pro "Exercitu Walliæ & per *Servitium Baroniæ*, dicuntur- "que inde Domini ejus *Barones de Burford*; sed tamen "in Parliamenta non prodeunt." I think it needless to add any more, but from what has been said an Answer may be given to Justice *Doddridge*'s Objection, *viz.* that such Manors as are *Tenure per Baroniam*, being alien'd to Common Persons, do not ennoble the Purchasers; for the Purchasers were in Fact *Barons by Tenure*, since no one can doubt, but that their Heirs must have paid Relief, *&c.* as such, but then they had no Right of coming to Parliament, unless they were summon'd by special Writ, in Virtue of the above-mention'd Laws of King *John* and *Henry* III. And the obvious Reason why, in a few Years after *Henry* III. we hear no more of these Unparliamentary *Barons*, is, because that those of them, who had not Interest sufficient to be summon'd to Parliament as *Barons*, (wisely preferring a Share in the Legislature of their Country to the empty Title of a Lord without it,) chose rather to mix themselves silently with the other Commoners of their respective Counties, thereby hoping, when the Knowledge of their Tenure was something lost, to get into Parliament in the House of Commons.

P. 49.

In Gloss.

Of Nobi. p 86.

During the first Period of Time therefore all *Peerages* or *Baronies* were Feudal; and even the Officiary Titles, as of Lord High-Steward, Earl Marshal of *England*, *&c.* tho' by *Dodderidge* they are reckoned to be of a Species by themselves, were also Feudal. Nor is there any Instance of any Person's being summon'd to Parliament, and acting as a Lord of Parliament, as High-Steward, or Marshal simply, but those Offices were always either annex'd (when they were Hereditary) to Fiefs, or else were bestow'd on Persons who were Tenants of the Crown *per Baroniam*, and might therefore have been summon'd to Parliament, tho' they had never had those Offices. As for Instance, the
4 Inst. Office of High-Steward was, as my Lord *Coke* says, annex'd to the *Barony* of *Hinckley*, which was parcel of the County of *Leicester*; that is, as he explains it, the *County* and *Barony* were held by the further Service of executing the Office of High-Steward of *England*; as appears from a Manuscript which he mentions, tho'
Bibl. Cot. he quotes nothing out of it, intituled, *Officium Seneſcalli*
sub Effi. *Angliæ*; the Passage to which he refers, I suppose, is
Vesp. B. 7. this, "Modus quo modo & quam Officio uti debet,
fol. 99. b. " ut *tenetur per Servitium & per Sacramentum Homagii*,
" & fidelitatis suæ talis est.

Having in this Manner explain'd that first Condition of Men, whom the King had an undoubted Power to summon to his Parliament, and who, when they appear'd, enjoy'd all the Rights of Parliamentary *Barons*; it follows in order to speak of those, who, tho' they were not *Barons by Tenure*, yet by reason of their being *Tenants in Capite by Knight Service*, were oblig'd to attend, when summon'd: But as the Pretensions of these Persons to the full Rights of *Peerage*, are founded upon the same Bottom with those other Persons, who', tho' they were summon'd, were yet under no Obligation to appear, unless they voluntarily thought fit so to do; it may perhaps shorten this Discourse, if we consider them both together.

It being agreed, that our Nobility not only sit in the House of Lords as *Barons*, but also that none but *Barons* have a Right to sit and vote there; and the Persons we now speak of, not being *Barons by Tenure*, it follows, that they can only be so in Virtue of the Writ that summons them thither; for as to the Barons by Patent, it will be necessary to speak of them by

by themſelves. But that the Reader may the better judge how the Writ can operate ſo far as to give the Perſons ſummon'd by it the Right of *Barons* to them and their *Heirs*, it will be proper here to inſert the Writ itſelf. "Rex, &c. N. de N. Chivalier, Quia de "adviſamento & aſſenſu concilii noſtri pro quibuſ-"dam arduis & urgentibus negotiis ſtatum & defenſio-"nem Regni noſtri Angliæ concernentibus, quoddam "Parliamentum noſtrum apud Weſtmon' die "proximo futuro teneri ordinavimus, & "ibidem vobiſcum, ac cum Prælatis, Magnatibus & "Proceribus dicti Regni noſtri colloquium habere & "tractatum: Vobis in fide & Ligeanciâ quibus nobis "tenemini, firmiter injungendo mandamus, quòd con-"ſideratis dictorum Negotiorum arduitate, & peri-"culis imminentibus, ceſſante excuſatione quacunque, "dictis die & loco perſonaliter interſitis nobiſcum, ac "cum Prælatis, Magnatibus ac proceribus ſupradictis, "ſuper dictis Negotiis tractaturi, veſtrumque conſi-"lium impenſuri, & hoc, ſicut nos & honorem no-"ſtrum, ac expeditionem negotiorum prædictorum di-"ligitis, nullatenus omittatis. Teſte, &c.

It has been already mention'd to have been Sir *Edward Coke*'s Opinion, that a *Peerage* was gain'd to a Man and his Heirs, by his being ſummon'd by (or at moſt once appearing in Obedience to) this Writ. Conformable to which Doctrine, Mr. Juſtice *Dodderidge* in his Treatiſe of Nobility puts theſe Queſtions. 1. Whether a Barony, upon a Man's being once ſummon'd by Writ, does deſcend from the Anceſtor to the "Heir —— And then if to the Heir Female —— And then if to the Husband of ſuch Heir Female, during her Life —— All which he reſolves in the Affirmative; but for ſuch Reaſons as (I own) I think do no ways anſwer the Character of the Man's Learning. I hope the Reader will forgive me, if, notwithſtanding the current Opinion to the contrary, I mention ſome Conſiderations which perhaps may make him doubt, whether ('till within theſe few Years paſs'd) the Law was ſo or not. P. 91.

And firſt, as to the Inheritance in the Honor that is ſuppos'd to be gained by it, let any Man but look into the Writ (that can conſtrue it) and he will find it to be entirely perſonal to the Man to whom it is directed, and that it is ſo far from creating a *Barony* to

him and his *Heirs*, that neither the Words *Baron Barony*, nor *Heirs*, are to be found in it. It is agreed, that the King cannot by his Letters Patents create any Man a *Baron* or *Peer*, either for Life, in Tail, or in Fee Simple, without expreſs Words of Creation in the Patents for that Purpoſe. Beyond which, in all the Patents that have paſs'd ſince the 20th of *Hen.* VIII. there is not only a ſpecial Clauſe inſerted for the creating the Patentees *Barons*, *&c.* but alſo for enabling them and their Heirs (according as the Limitation is) to hold and poſſeſs a Seat and Place in Parliament. It may not perhaps be unreaſonable to think, that it ſeems equally neceſſary, that ſpecial Words of Creation ought likewiſe to be inſerted in the Writ, or that otherwiſe the Writ cannot operate ſo as to create a *Baron*: Such as for Inſtance was practis'd in the Caſe of Sir *Henry de Bromflete*, who being ſummon'd to Parliament 27 *Hen.* VI. this Clauſe was inſerted into his Writ; "Volumus enim vos & Hæredes veſtros Maſ-" culos de Corpore veſtro legitimè exeuntes Barones " de Veſcy, exiſtere." Now as this Writ has given great Surprize to many Perſons, by reaſon of its being the only Writ in which ſuch a Clauſe is to be found, I ſhall make ſome Obſervations upon it. It has been already ſaid, that about the 49th or 50th of *Hen.* III. a Law was made (and the above-mention'd Paſſage out of *Cambden*'s Manuſcript is quoted by my Lord *Coke* as an Act of Parliament now in Force) by which it was enacted, that none of the *Tenants per Baroniam*, or *Barons*, who had all a Right to be ſummon'd before, ſhould for the future have Voice in Parliament, but only thoſe that ſhould be ſummon'd by the King's ſpecial Writ. The Conſequence of which was, that the neglected *Barones Minores* ſoon mingled themſelves with the other Commons of their ſeveral Counties, and the Term *Baron* in proceſs of time came to be appropriated only to thoſe *Majores Barones*, who were conſtantly ſummon'd to Parliament, but yet the Tenure of the neglected *Barons* ſtill ſubſiſted. The Peerage of this very Sir *Henry de Bromefleet* is an Inſtance and Proof of it, ſince he was one of thoſe who held *per Baroniam*, but had been neglected to be ſummon'd to Parliament, as appears by the Title of *Veſci*, which he aſſum'd. For *Ivo de Veſci* was one of the *Barons* who were Inſtituted at the Conqueſt, and who had

12 Rep. 70. Ld. Abutgaveny's Caſe.

had married the Daughter and ſole Heireſs of *William Tyſon* a *Saxon*, who was the Son and Heir of *Gilbert Tyſon* who was kill'd on *Harold*'s Side, in the Battle againſt *William* the Conqueror, by which Means he became poſſeſs'd of thoſe Lands that were afterwards (upon the additional Services being impos'd) known by the Name of the *Baronies* of *Alnwicke* in *Northumberland* and *Malton* in *Yorkſhire*. Now by the Genealogy of the *Veſcy*'s, it appears that the Lands and Honors of that Family by Female Heirs came to veſt in one *Gilbert de Aton*; And Sir *Henry de Bromflete* was the Son and Heir of *Margaret*, Daughter and Heir of *Anaſtaſia* the Wife of Sir *John Saint John*, Knight, who was Daughter and Heir of *William de Aton*, the Son and Heir of *Gilbert de Aton* laſt mention'd. Which *Gilbert* and *William de Aton* had indeed been both (but not conſtantly) ſummon'd to Parliament, *viz. Gilbert* was ſummon'd to the Parliaments held 18th of *Ed.* II. to the 1ſt of *Edward* III. and to the 16th of *Edward* the Third, and *William* was only ſummon'd to the Parliament held 44°. *Edward* III. and never ſummon'd to any other Parliaments; Now Sir *Harry de Bromflete* dy'd in the 8th of *Edward* the Fourth, ſeiz'd (as it appears by the Inquiſitions taken) of the above-mention'd Lordſhip or *Barony* of *Malton*. As this Writ has been hitherto generally ſuppos'd to have been an Original Creation of a new *Barony*, I hope this digreſſion will be excuſed, in order to ſhow that no Barony at all was created by it, but that it was only an Exerciſe of that Power, which (as is before ſaid) the King had of calling any *Tenent per Baroniam* whatſoever to the Houſe of Lords.

Dugd. Baron. Vol. 1. p. 89.

Vol. 2. p. 234.

Rot. clauſ. 18 Ed. 2. dor. m. 21 idem

1 Ed. 3. p. 1. dor. m 2. idem

16 Ed. 3. p. 2. dor. m. 38.

Rot. clauſ. 45 Ed 3 dor. m. 3.

2. It is a known Rule in Law that the King's Grant cannot enure to two Intents, eſpecially when one of them is clearly expreſs'd and the other is not. Now if this Writ of Summons does create any Perſon a *Baron* or *Peer*, it operates by way of Grant, which muſt be by the Implication of an Intent, which is not only not expreſs'd, but which is alſo perfectly foreign to that which is, and which therefore (at leaſt in every Thing but this Writ) cou'd be in Law only intended. For the Intention of the King clearly expreſs'd in the Writ is not to create the Perſon ſummon'd a *Baron*, but only to *conſult* and *treat* with him concerning the Affairs of the Nation, which certainly may be done without

Plowd. 333-4. Cok. 1 Rep. 48-32. 3 Rep. 73, 74, &c.

without his being a *Baron*. " Vobiſcum (by which the Perſon ſummon'd ſeems to be expreſly diſtinguiſh'd from the *Prelates* and *Barons* that follow) " Et cum " Prælatis, Magnatibus, *&c.* colloquium habere & " tractatum. Theſe are the Words of the Writ, and I muſt own that I do not comprehend what Magick there is in them, to make them perform what no Man will pretend to ſay they ſignify. And as to the other Clauſe by which the Perſon is ſummon'd to be Perſonally preſent with the King and Lords, " dictis die " & loco perſonaliter interſitis nobiſcum & cum Præ- " latis, *&c.* veſtrumque conſilium impenſur' *&c.*" The Reader muſt Judge if there is any more force in that than there is in the laſt. Nor is there any Thing more in it than what the Judges, *&c.* are commanded and actually do every Parliament, for they as well as the *Barons or Peers* are conſtantly ſummon'd *ad conſilium impendend'*. Not that I imagine the Judges, (who are agreed to be only ſummon'd as Aſſiſtants to the Houſe;) to be *Barons* of Parliament; but only that thoſe who think other Perſons ſummon'd by Writ, to have been antiently conſider'd as *Barons* of Parliament, wou'd reflect and determine with themſelves, which part of the Writ it is that made them ſo. For if it was the firſt part of the Writ, that runs, " *Vobiſcum ac* " *cum Prælatis, Magnatibus & Proceribus*, &c." that created them *Barons*; How comes it that the Judges are not likewiſe *Barons*? Since in the 49th of *Henry* VI. 12th of *Edward* IV. 22d of *Edward* IV. and indeed in almoſt all their Writs of Summons to Parliament that Clauſe is inſerted. And as to the ſecond Clauſe, that runs, " *Quod* &c. *perſonaliter interſitis*, &c." that alſo is common to the *Judges*, as well as the *Barons*. My Lord *Coke* does in ſeveral Places obſerve, that the Writ of Summons to Parliament is unalterable, otherwiſe than by Authority of Parliament, tho' (perhaps if it was worth while) it might be ſhown that till within this laſt two hundred and fifty Years, there ſcarcely ever was two of them together alike. And indeed he himſelf upon another Occaſion does ſeem to be ſenſible of it. For he ſays, that one of the Differences between the Writs to the *Lords* and the Writs to the *Judges*, was that, that to the Lords did run, " *Quod*— " *interſitis nobiſcum ac cum cæteris Prælatis, Magnatibus,* " *&c.* and was peculiar to the Lords, the Judges being

4 Inſt. 10. & alibi.

4 Inſt. 4.

ing only ſummon'd, " *Quod interſitis nobiſcum ac cum* " *cæteris de Concilio noſtro*; and yet that Word *cæteris* is not in the Writ, which in the Lord *Aburgaveny*'s Caſe he himſelf commends as excellently well drawn. But however, if it be this ſecond Clauſe that creates them Barons, why then in the 24th of *Edward* the 3d, *William de Shareſhall* and Twelve other Perſons, of whom Four were but Serjeants at Law, were created *Barons*; for their Writ, directly contrary to my Lord *Coke*'s Aſſertion, runs in that Stile which he ſays is peculiar to the Lords of Parliament. Others have thought that the putting in or leaving out of the word *cæteris* was the peculiar Mark of Diſtinction. And yet in the 25th of *Edward* the Firſt, the Judges were ſummon'd by directly the ſame Writ that the Barons of Parliament were. And on the other hand, by a Writ of Prorogation in the 33d Year of *Edward* the Firſt, as alſo by a following Writ of Summons in the ſame Year *&c.* it appears that the Biſhops and Temporal Lords were ſummon'd by Writs that ran " Quod—interſitis nobiſcum ac " cum cæteris de Concilio noſtro." But to conclude this Point, I ſhall only add ſome few Inſtances in ſeveral Reigns of the *Judges* and *Barons* of Parliament being ſummon'd by the very ſame Writs. In the 1ſt of *Edward* II after the Writs to the *Barons*, the ſame Writs follow to above thirty other Perſons as Aſſiſtants, with this difference only, that the Words " *in* " *Fide & Homagio*, (as at this Day they are conſtantly done) are left out, and the Note at the end of it is remarkable. " Nota quod in hâc ſummonitione Ju- " ſtitiarii ac alii de concilio Domini Regis, intermixti " tunc cum Baronibus." And likewiſe in the 5, 8, 9, 11, 12, 13, 14th of *Edward* II. the ſame Writs are directed to both *Judges* and *Barons*, ſo likewiſe in the 2, 3, 4, 5, 6, 11th, *&c.* of *Edward* III. the ſame Writs are directed to both *Judges* and *Barons*; I cou'd add many more Inſtances, but I think it needleſs. And now if the Direction of the Writ created *Barons*, theſe Gentlemen were all made ſuch, yet the ſame Men were at other Times ſummon'd as the Judges now are to be, but as *de concilio Regis in Parliamento*. It is true however, that from the 47th of *Edward* III the Writs to the *Barons* and *Judges* have been generally different, tho' ſometimes they have been the ſame. But then the difference is ſo ſmall as to Words of Creation, that

12 Rep.

Ve. ſummon. ad Parliam.

Rot. clauſ. 25 Ed. 1. dor.

Rot clauſ. 33 Ed. 1. m. 9. 10.

Rot clauſ. 1 Ed. 2. dor. m. 11.

I be-

I believe it wou'd be very difficult for any Man to ſhow how one ſhou'd create a *Peer* or *Baron*, and the other ſhou'd not. And from the Inſtances I have mention'd, I think it appears that the *Barons* is perfectly diſtinct from the Writ of Summons, for if it is not, why are not thoſe Perſons rank'd among the *Barons*. Since no reaſon can be given, why the ſame Writ ſhou'd make one Man *a Baron* and not another.

3. It has been already obſerv'd that my Lord *Coke* affirms, that if the King does by Writ ſummon a Lay-man to the Houſe of Lords, he cannot refuſe the Service. But that if he call'd an Abbot, or any other Regular, he cou'd refuſe to ſerve unleſs he held *per Baroniam*. But yet the reaſon of the Law ſeems to be the ſame in the Caſe of a Lay-man, as of an Abbot, *&c.* For every Writ Mandatory, as a Writ of Summons to Parliament is, ſuppoſes the Perſon to whom it is directed, to be under an Obligation to obey it. I am ſenſible that it may here be objected, there is no fear of any Man's Diſobedience, and in Modern Practice it is certainly true. But then it is as true that the Law is not founded upon Modern Uſage, but upon antient Cuſtom, when Men were not ſo Ambitious of being *Barons* as they now are, but were often upon their own requeſt diſcharg'd from any Service of that Nature. And therefore if a Lay-man who holds not *per Baroniam*, be as much at liberty to refuſe his Attendance as a Regular, it follows that the direction of a Writ to him, does not make either him or his Heirs *Barons*, or Lords of Parliament. It is true, that if a Man accepts of a Pattent by which he is created a *Baron*, he by his own Voluntary Acceptance becomes oblig'd for the future to attend in Obedience to all Writs that ſhall be directed to him. But what makes this Obſervation ſomething ſtronger is, that every Lord who being ſummon'd, abſents himſelf without the King's leave is liable to be Fin'd, which it is unreaſonable to ſuppoſe he can be, unleſs he be under a Legal Obligation to obey the Writ. The only reaſon my Lord *Coke* gives, for a Regular's not being oblig'd to obey the Writ is, becauſe he does not hold *per Baroniam*, which ſeems to be equally ſtrong in the Caſe of a Lay-man. The Abbot of St. *James's Northampton* being ſummon'd in the Twelfth of *Edward* the Second, Petition'd to be diſcharg'd upon a ſuggeſtion

Selden's tit. of Honor.

geſtion that he was not a Tenant *per Baroniam*, the Words are, " Non tenet *per Baroniam nec de Rege in Ca-*
" *pite* ſed tantum in puram & perpetuam Eleemoſy-
" nam, & nec ipſe Abbas nec Predeceſſores ſui fuerunt
" ad Parliamentum citati hucuſque. *Unde petit Reme-*
" *dium & habuit.*" But here it may be obſerv'd that this Paſſage juſtifies what I before ſaid, that not only the Tenants *per Baroniam*, but alſo the other *Tenants in Capite*, &c. were oblig'd to attend in Parliament when ſummon'd. And therefore this Abbot excuſes himſelf as well upon the account of *Nul tenure en chief*, as *Nul tenure per Baroni*. Again in the 26th Year of *Edw.* III. the Abbot of *Leiceſter* was by Patent under the great Seal upon his Petition and Suggeſtion that he was not a *Tenant per Baroniam*, diſcharg'd from all Attendance in Parliament. The Patent is, *per Petitionem de Par-*
liamento. And firſt recites as follows, " Supplicavit Rot. Patt.
" nobis Abbas de Leiceſtriâ ut cum ——aliqua ter- 26 Ed. 3. p. 2. m.
" ras vel tenementa de nobis *per Baroniam*, ſeu alio 22.
" modo non teneat per quod ad Parliamenta ſeu conſi-
" lia noſtra venire teneatur ——Nolentes ipſum Ab-
" batem *indebitè ſic Vexari*, conceſſimus quod idem
" Abbas, *&c.* de veniendo ad Parliamentum, *&c.* qui-
" eti ſint & exonerati in perpetuum." Now theſe two Perſons being upon this only account diſcharg'd from their Attendance in Parliament, and the obliging them to attend being ſtyl'd an *undue Vexation*, becauſe they did not hold *per Baroniam*, ſeems in ſome meaſure to be a Proof (the reaſon in both Caſes being the ſame) that neither a Lay nor Religious Perſon are oblig'd to attend in Obedience to the Writ, unleſs they are Tenants *per Baroniam*. But further this Patent to the Abbot of *Leiceſter*, ſhows how there came to be ſo many Clergy ſummon'd to the Parliament of the 49th of *Hen.* III. as are before-mention'd, and yet not above one third of them either then or afterwards were really *Barons* of Parliament. It is before ſaid, that thoſe who were not Tenants *per Baroniam*, or by *Knight-Service*, &c. might refuſe to attend, unleſs they Voluntarily thought fit ſo to do. And accordingly it follows in this Patent, by way of reaſon why the then ſummons of the Predeceſſor of the Abbot of *Leiceſter* ſhou'd not bind him, that he was Voluntarily ſummon'd. " Quo anno (ſcil 49. *H.* 3.) omnes Ab-
" bates & Priores Regni noſtri Angliæ ad Parliamen-

" tum ejuſdem Proavi noſtri tunc tentum voluntarie " ſummoniti fuerunt.

4. But that the Reader may the better judge, how far the Direction of a Writ of Summons to any Man who was not a *Tenant per Baroniam*, cou'd be thought to create him a *Baron* of Parliament, either for Life, or to him and his Heirs, *&c.* I ſhall mention a few Particulars that appear upon view of the Writs of Summons that are extant. If it be true that every Man (tho' he be not a *Baron* either by Tenure or Patent) ought upon the receipt of his Writ to enjoy the Dignity and Honor of a *Baron*; How is it that ſo many Abbots and Priors as were ſummon'd 49°. *Henry* III. were never reckoned among the Spiritual *Barons*! Nor can I think it a ſufficient Anſwer to ſay, that tho' they were *Barons*, yet as *Volenti non fit Injuria*, their *Baronies* were by their own Conſent defeated and taken away, ſince according to a late Reſolution of the Houſe of Lords, tho' a *Peerage* may be forfeited, it cannot by any other Act whatſoever (but an Act of Parliament) be either ſurrendred, defeated or extinguiſh'd. But I ſhall not inſiſt upon what was done during the moſt confus'd part of *Henry* the Third's Reign. In the 18th of *Edward* II. Writs were directed to the Arch-Deacon of *Northampton*, and to the Dean of the Arches *London*, &c. who therefore according to this Rule, ought to have been reckoned among the Spiritual Barons of the Kingdom, tho' no Writs were for ought appears ever directed to them afterwards. The like Inſtances might be given in the Caſes of Guardians of the Spiritualities of Vacant Biſhopricks, Vicars General, *&c.* who have been frequently ſummon'd to Parliament by theſe creating Writs, without its being ever ſuſpected that they were thereby created *Barons*, either for Life or otherwiſe.

Viſc. *Purbeck's* Caſe.

Rot.clauſ. 18 Ed. 2. dor. 5.

4. Inſt. But my Lord C. J. *Coke* further informs us, that every Temporal Lord who Sits in the Houſe, ought *ex debito Juſtitiæ* to have a Writ of Summons directed to him every Parliament. Nor can they therefore by Law, either with or without their Conſents be ever left out of the Liſts of Summons. And the Lords have in all Ages reſented any Omiſſion of that Nature as the higheſt Breach of their Privileges. As in the Year 1255. the *Barons* refus'd to grant any Aid, or to tranſact any Buſineſs, becauſe all the *Barons* were not ſum-

ſummon'd according to the Tenor of *Magna Charta*. Matth. Paris. "Quod omnes tunc temporis non fuerunt juxtà tenorem Magnæ Chartæ ſuæ vocati. Et Ideo ſine Paribus ſuis tunc abſentibus, nullum voluerunt tunc reſponſum dare vel Auxilium concedere vel præſtare." And it was frequent in ſubſequent Parliaments, to prorogue or adjourn for ſome ſhort Time at the beginning of a Seſſion, in order to give Time to ſuch Members of either Houſe as were abſent to arrive, before they wou'd enter into any Buſineſs. I think I need not quote Precedents for what is ſo generally known. Every Reader will doubtleſs believe it Natural that each Houſe ſhou'd concern itſelf for its own Members; but what is more, the Commons when they have thought the Houſe of Lords too thin, tho' the *Peers* acquieſc'd themſelves, have yet refus'd to proceed on Buſineſs, till all thoſe Writs of Summons which of Right ought to have been ſent to the Lords, were actually Iſſued. As for Inſtance in the 20th of *Richard* II. The Commons before they wou'd enter upon the Buſineſs propos'd to them by the Chancellor in the King's Name, Petition'd that all the Abſent Biſhops and Lords might be ſent for to Parliament. And of later Times, in the Caſes of the Earls of *Arundel* and *Briſtol*, upon their Confinement, the Houſe of Lords adjourn'd themſelves from Day to Day, with a Reſolution not to enter upon any Buſineſs till they had Satisfaction in relation to thoſe two *Peers*. Now if it be admitted for Truth, that the Direction of a Writ of Summons to any Perſon creates him a *Peer* to him and his Heirs, and that every *Peer* has a Right to demand a Writ of Summons to every Parliament; it follows, that every Man to whom ſuch a Writ was ever directed, was thereby created a *Baron* to him and his Heirs, who had conſequently a Right to demand their Writs of Summons. And yet if the Liſts of the Names of thoſe who have been ſummon'd to Parliament be conſider'd; it will not be very eaſy to conceive how the Notion of a Writ's creating a *Peerage* in *Fee* ever came into the World. For from the 49th of *Henry* III. to the 23d of *Edward* IV. (from which Time the Summons have been more regular) not fewer than 98 Lay-men have been ſummon'd to Parliament one ſingle Time, by the very ſame Writs by which the Earls and the other undoubted Barons

Rot. Parl. 20 Ric. 2. n. 8.

Ruſhw. Coll.

were ſummon'd, and yet neither themſelves nor any of their Name or Poſterity, were ever afterwards ſummon'd to any Parliament or Great Council. Now is it poſſible, if theſe Gentlemen had by their being thus once ſummon'd gain'd a *Peerage* in Fee, that the Houſe of Lords, ſo juſtly Jealous of its Liberties, and ſo conſtantly ready to vindicate the Rights of any one of its injur'd Members, ſhould paſs over in Silence the Omiſſion in all future Writs of Summons of ſo many rightful *Barons*? And is it conceivable, that ſo many Barons and their reſpective Heirs ſhould never complain of ſuch an Injury, nor ever put in a Claim to their *Unextinguiſhable Baronies*? What therefore can be concluded from ſuch Facts? ——If their Writs did not create them *Barons*, they could only be ſummon'd as Aſſiſtants to the Houſe of Lords, and as *de Concilio Regis in Parliamento*.

But here it will be uſeful to recollect what has been before obſerv'd, *viz.* That the whole of Parliamentary Buſineſs may be reduc'd under the two general Heads of *Advice* and *Conſent*. Every *Tenant by Knight-Service*, as well as *per Baroniam*, did owe Homage to the Lord of whom he held his Lands; and the Oath of Homage did comprehend in it, that the Tenant was obliged to give to his Lord the beſt Counſel and Advice he was able; and alſo that he ſhould keep ſecret all ſuch Counſels as ſhould be communicated to him, which by the Way is one Reaſon why all *Fiefs* were Originally Maſculine, and could not deſcend to the Heirs Female.

Lib. Feu. Tit. 1. "Hoc autem notandum eſt, quod licet filiæ, ut Maſculi, Patribus ſuccedant, Legibus tamen a Succeſſione feudi removentur." Of which Law *Zaſius*, a very conſiderable Feudal Writer, affirms the Reaſon to be, that by Intendment of Law a Woman was incapable of keeping a Secret, and therefore could not ſucceed to a *Fief*. Now the Tenants *in Capite* of the Crown, who were oblig'd to ſwear Homage, were either Tenants *per Comitatum*, *Baroniam*, *&c.* or by *Knight-Service*, and who, by Virtue of their Homage, (as is before ſaid) were equally oblig'd to attend when ſummon'd to Parliament: The Difference therefore that there was between them aroſe from the Difference of their *Tenure*; and as they could not be *Peers* to each other, by reaſon that they were not *per idem Servitium Convaſſalli*, it ſeems reaſonable to conclude, that their Buſineſs

Buſineſs and Rights in Parliament were different. In Matters of meer Advice to the King, the *Tenants per Baroniam* and by *Knight-Service* might act indifferently together, but when any thing was demanded of the *Barons properly ſuch*, I cannot but think the *Tenants by Knight-Service* acted only as Council to the King, to adviſe him in the Management of his Affairs; ſince it ſeems to be abſurd to imagine, that in Caſes like that of 13 *Ed.* III. when the *Barons* granted the Tythe of the Grain, *&c.* growing upon the Demeſne of their *Baronies*, the *Barons* would ſuffer the King to call by Writ a Poſſe of Tenants by Knight-Service, or other Perſons who were no ways concern'd in the Payment, to vote a Tax upon others, who held *per Baroniam*.

In other Affairs likewiſe which might be mention'd, wherein the *Barons* acted as the *Regalis Curia Regis Angliæ*, it ſeems reaſonable to believe, that thoſe Tenants by Knight-Service only, *&c.* who by Writ were ſummon'd to Parliament, were conſider'd only (as the Judges at this Day are) as Counſellors to the King and *Barons*. If what I have now ſaid be thought true, in relation to the Tenants by Knight-Service who were oblig'd to attend when ſummon'd, it is much more ſo, in relation to the third Species of Men, who could only be *Voluntariè ſummoniti* But before I proceed any further, I ſhall ſhortly examine whether the Facts of Parliamentary Hiſtory will anſwer to this Notion.

And firſt, to reflect only upon what has been already ſaid: This ſeems to be the only way of accounting for the *Barons or Lords* having never taken Exceptions to the King's ſummoning ſo great a Number of Men only once to ſerve in Parliament, and then omitting them and ther Heirs for ever after: Which it is impoſſible ſhould not have been done, had the Perſons ſummon'd been thereby really created *Barons*. But upon Conſideration of the Liſts of Summons this further Remark may be made, that theſe Perſons were always treated exactly in the ſame manner as the Judges and Serjeants were, who were yet never ſuſpected by Virtue of their Writs to have been created *Barons*. And as to them every one knows, that they were never antiently either regularly or conſtantly ſummon'd; the King always, by ſpecial Writs, ſummoning only ſuch and ſo many of them, whoſe Coun-

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ſel and Advice he thought fit to uſe. And therefore it ſometimes happen'd, that if the King had no great Opinion of their Capacities, or thought the Advice of other People might be more uſeful to his Affairs, he would neglect them all. As for Inſtance, *Edw.* I. in the 28th Year of his Reign, tho' he did not neglect his Judges, yet Writs were directed to the two Univerſities, commanding them to ſend ſome of their beſt Civilians to adviſe the King in Parliament; "Rex, &c. "Cancellar' & Univerſitat' Oxon' Vobis mandamus, "&c. Quod quatuor vel quinque de diſcretioribus & "in jure ſcripto magis expertis Univerſitat' prædict' "ad Parliamentum noſtrum apud Lincoln' mittatis, "&c. But however, as the Judges and thoſe other Perſons, who were ſummon'd only as Aſſiſtants to the King and Lords in Parliament, never pretended, that, becauſe the ſame Writs were ſometimes directed to them as to the *Barons*, therefore they were thereby created *Barons*: The Lords never concern'd themſelves at their being (according to the King's Pleaſure) ſometimes ſummon'd to Parliament, and at other times totally left out; ſince as thoſe Men, by not being actually *Barons*, had not a Right of Voting among them in Matters of *Conſent*, (as *e.g.* in Grants of Aids, Alterations of Laws, *&c.*) the Lords were no ways intereſted, and therefore could not attempt to interpoſe in relation to ſuch Perſons as the King thought fit to ſummon, to adviſe and conſult with, as to his granting or not granting the Royal Aſſent to any thing that might be propos'd to him in Parliament.

Rot. Cla. 28 Ed. 1. dorſ. 3.

Now if we ſee other Perſons ſummon'd in the ſame manner as the Judges were, or if poſſible in a worſe, that is, at the diſtance of ſeveral Years, and ſeveral Parliaments one time from the other, and this without any Complaint of their being thus either ſummon'd or left out, is it not reaſonable to conclude, that their Buſineſs likewiſe in Parliament was only as Aſſiſtants, in the ſame manner as the Judges are by all allow'd to be? For during the ſame Period of time which we laſt mention'd, that is from 49 *Hen.* III. to 23 *Ed.* IV. there were no leſs than fifty Perſons ſummon'd in that manner by general Writs, and their Names liſted (as frequently the Names of the Judges were) among the Temporal *Barons*: As for Example, *William de Aldeburghe, Nicholas de Stapleton*, and many other Perſons who

who might be nam'd, were ſummon'd to ſeveral Parliaments, by ſpecial Writs, not immediately ſucceeding each other, but at a Diſtance of Years, during which many Parliaments had interven'd, to which neither of them had been ſummon'd, and then at laſt totally left out, and none of their Poſterity have been ever ſummon'd ſince. *William de Aldeburghe* was ſummon'd to the Parliaments held *Annis* 44, 49, 50. of *Edward* III. but was omitted in the Parliaments of 45, 46, *& iterum* 46, *&* 47. of *Edward* III. And *Nicholas de Stapleton* (whoſe Father had been indeed ſummon'd 6, and 7. *Edw.* II. and died in the eighth Year of that King's Reign, leaving his Son of full Age) was yet never ſummon'd to Parliament 'till 16 *Edw.* III. and dying in the ſeventeenth left his Son *Miles* of full Age, who however was not ſummon'd to Parliament 'till the 32 *Edw.* III. (It ſeems *Dugdale* could not find the Bundle of this Year, ſince in his Summons to Parliament he makes this Note, *Nullæ Summonitiones in annis* 32, *&* 33.) and then was never ſummon'd more, tho' he liv'd until 47 *Edw.* III. nor any of his Poſterity, tho' he left Heirs. So likewiſe *John Strivelin* was ſummon'd, as *Dugdale* ſays in his Baronage, from the 16th to the 44th of *Edward* III. inclusive, but in Fact, according to his own Liſts of Summons, he was only ſummon'd *in Annis* 16, 37, 38, 39, 42, *&* 44 *Edw.* III. I think it needleſs to incumber the Reader with more Caſes to this Purpoſe, ſince every Man upon once looking upon the Liſts of Summons may obſerve Numbers of them. Dug. Bar. Vol. 1. p. 70.

From all theſe Particulars therefore, and much more that might be added, it ſeems reaſonable to believe, that as the King's Writ to the Judges did not conſtitute either them or their Heirs *Peers* or *Barons* of the Realm, ſo neither did the ſame Writ, directed to any other Perſons, create them *Peers* or *Barons*, either for Life or otherwiſe, unleſs they were ſuch as were Tenants *per Baroniam*, and had been neglected as being *inter Barones Minores*, as is before obſerv'd. But what has now been ſaid will not appear ſo ſurprizing, if it be conſider'd, that the Judges did formerly make a much greater Figure in Parliament than they now do; for when the Commons contented themſelves with Petitioning, and the Lords with Anſwering, leaving it to the Judges to draw their Petitions and Anſwers into

into the Form of Statutes, they were in ſome meaſure concern'd in the Legiſlature of the Kingdom. Many Particulars might be mention'd upon this Occaſion, but I for ſhortneſs omit them, tho' however it ought to be obſerv'd, that it is very difficult from old Books which mention the Tranſactions in Parliament, and the Names of the Perſons moſtly concern'd, (tho doubtleſs it was well known at the time of Action) at this time to diſtinguiſh the real *Barons* from thoſe who were only as Aſſiſtants in Parliament. And beſides, it was uſual formerly when any matter was under Conſideration in the Houſe of Lords, to commit it indifferently to any Perſons who were ſummon'd to the Houſe, without diſtinguiſhing who were, or who were not *Barons*. The modelling or contriving a Bill, *&c.* in Parliament being altogether matter of Advice, was therefore common to all who (like the Judges) were by the Clauſe *Veſtrumque Conſilium impenſuri*, ſummon'd to give Councel and Advice to the King. But then (as I think) when they came to Reſolve upon the Bill's, *&c.* paſſing, which is purely matter of *Conſent*, none had the Right of voting but thoſe who were actually *Barons*. The Uſage at this Day is for the Houſe of Lords to refer Buſineſs by Order, to the Judges, who report to the Houſe their Opinion concerning it. But formerly the Judges have been made joint-Committees with the Lords, and that ſo late as the Reign of Queen *Elizabeth*; for 26 *Jan.* 1563. the Bill againſt forging Evidences, *&c.* was committed to the Archbiſhop of *York*, the Duke of *Norfolk*, the Marqueſs of *Northampton*, *&c.* to the Chief Juſtice of the Queen's Bench, the Chief Baron of the Exchequer, and to the Queen's Sollicitor. On the 20th of *March* following, the like Caſe again happen'd; and indeed it was very frequently practis'd in all her Parliaments, until the 39th Year of her Reign, from which time, tho' I cannot pretend to tell the Reaſon, it has been diſus'd. Now according to the Notions and Practice of the preſent Age (did we not certainly know how things ſtood in the Reign of Queen *Elizabeth*) we ſhou'd without heſitation conclude all Joint-Committees to be Peers, and therefore we ought much leſs, when the Queſtion is concerning much more antient times, and of which no Journal Books are extant, to fancy that all Men who were ſummon'd by Writ to

Journal Dom' Proc. 1563.

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Parliament, were equally Peers of the Kingdom, when in Fact ſome who were ſummon'd by thoſe Writs, are agreed never to have been thought ſuch. And therefore, if it be true, that if the Writ makes one Man a *Baron*, it muſt alſo make every Man ſo to whom it is directed, and that being manifeſtly not true in reſpect to the Judges, *&c.* it from thence follows, that a *Barony* is ſomething diſtinct from the Writ, and that can only be *Tenure per Baroniam.*

But laſtly, that we may not too long inſiſt upon theſe *Barons* by Writ, it ſhall be obſerv'd, that tho' the common Notion is otherwiſe, yet even Modern Practice has not been ſo inconſiſtent with what has been before explain'd, as is generally imagin'd. But here it will be proper to take notice, that a Diſtinction muſt at this Day be made between the Perſons to whom theſe Writs are directed; for they are either to the elder Sons of Peers, who are ſummon'd by the Title of ſome *Barony* actually in the Father, or elſe they are directed to Commoners who have no Right of Succeſſion to any Peerage whatſoever. And as to the laſt of theſe Perſons, there is no doubt, but that if the Writ does any thing, it muſt operate by way of Creation; but as to the firſt, even as the Law is now ſuppos'd to ſtand, ſome Doubt may be made of it. Every Peer in the Houſe of Lords has Precedence according to the Seniority of his Creation; now it is obvious, that if the Writ does in both Caſes equally operate by way of Creation, that then the eldeſt Son of a Peer, as well as any other Commoner, when he is by Writ ſummon'd to Parliament, would be the *puiſne Baron*, and wou'd conſequently give place to all others, yet the Uſage of the Houſe of Lords is contrary: For if the Eldeſt Son of a Peer be ſummon'd by Writ, it is generally by the Stile of ſome *Barony* that is in his Father; and his Place in the Houſe is regulated according to the Antiquity of that *Barony*: As for Inſtance, ſuppoſe the eldeſt Son of a Duke of *Norfolk* be ſummon'd by the Title of Lord *Mowbray*, his Place on the *Barons* Bench is that of the antient *Barons* of *Mowbray*; and accordingly in the Liſts of Summons of the 32d of *Charles* II. *Henry Howard*, Lord *Mowbray*, is plac'd as the firſt Baron of *England*, which is in ſuch Caſe ſuppos'd, by the Conſent of the Father, to be veſted in the Son. The Writ of

Summons therefore ſeems not ſo much to be conſider'd as the Creation of a *Baron*, but only as an *Inſtrument of Conveyance*, or Method of transferring a *Barony* or *Honor* from one Perſon to another; for if it is not ſo, what Reaſon can be given, why the Eldeſt Son of one Earl, ſummon'd by the Style of his Father's *Barony*, ſhall have Precedence according to the Rank and Antiquity of that *Barony*? And that the Eldeſt Son of another Earl, if he be by Patent created to a Title or *Barony* foreign to his Family, ſhall be conſider'd as the Youngeſt *Baron*, and take his Place in the Houſe accordingly. I ſpeak (and I think every Man ought) with great Submiſſion upon this Subject; but (if I miſtake not) the Law even at this Day is, that tho' the laſt of theſe Perſons takes a *Barony* in Fee, or otherwiſe, according to the Limitation of it, yet the firſt, upon whom the Writ operates only by way of Inſtrument of Conveyance, has no other Title in the *Barony* than his Father had, from whom it was convey'd; and therefore if the Father has only an Eſtayle, Tayle, *&c.* in the *Barony*, the Eſtate of the Son, tho' ſummon'd by Writ, is not enlarg'd, nor made a Fee, and deſcendible to his Heirs general. Now it cannot be pretended (as I have ſometimes heard) that as the Eldeſt Son of a *Duke*, *&c.* does out of Parliament take Place of a *Baron*, when he is ſummon'd to Parliament, the *Barons* for that Reaſon yield Precedence to him in the Houſe; for if that was the Caſe, he would likewiſe in Parliament take place of all the Viſcounts and Earls, which is never done; according to the Reſolution *6 Hen.* VIII. in the Caſe of the Earl of *Surry*, who pretending to take Place in Parliament above all the Earls, as Son to the Duke of *Norfolk*, it was reſolv'd that he ſhould be rank'd only according to the time of his being created Earl of *Surry*. If the Writ was therefore to be conſider'd as creatory of a new *Barony*, it ſeems more than probable, that a like Reſolution would have been taken for ranking the Perſon ſummon'd among the *Barons* according to the time of his Creation: Which not being done, manifeſtly ſhows the Writ to be no more than an Inſtrument of Conveyance; for there can be no more Reaſon for the Eldeſt Son of a Duke's taking place of the *Barons*, when he is created a *Baron*, than there is for his taking place of the Earls, when he is created an Earl.

Journal Dom' Prov'

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When therefore the eldeſt Son of a Nobleman is ſummon'd to the Houſe of Peers, by the Title of his Father's *Barony*, there is not a new *Barony* created; but by the Operation of the Writ, according to the Cuſtom of Parliament (which is part of the Law of the Land) the *Barony* of the Father is transferr'd to the Son: From whence (if this Notion be true) it evidently appears, that the Number of *Barons* in Fee is not near ſo large, as it has been by ſome late Writers repreſented to be, upon an Imagination that the Eldeſt Sons of Peers, when they are by Writ ſummon'd to Parliament, by the Style of their Fathers *Baronies*, do thereby gain an Eſtate in Fee-Simple in the Honor, ſo as to make it deſcendible to their Heirs general, and that conſequently their Peerages are not ſo liable to be extinguiſh'd, as they were before. But here it will not be improper to obviate an Objection that may be made, *viz.* That ſince all the Peers are agreed to ſit and vote in the Houſe only as *Barons*, the Writ cannot operate by way of Conveyance of the Father's *Barony* to the Son; becauſe that, if it did, the Father would have no *Barony* left whereby he could be intitled to ſit in the Houſe, and that therefore the Writ muſt operate by way of Creation. In Anſwer to which it muſt be obſerv'd, that a Diſtinction is to be made between the Writ's being directed to the Eldeſt Son of an *Earl*, *&c.* and to the Eldeſt Son of a *Baron*; for as I take it, tho' an Earl be poſſeſs'd of only one *Barony*, yet may his Eldeſt Son be ſummon'd by that Title, and the Father ſtill retain in himſelf all the Rights of *Barony*: But a *Baron* muſt regularly have ſeveral *Baronies* centring in him to enable his Eldeſt Son to be call'd by Writ, becauſe that in ſuch Caſe, tho' one of them be transferr'd to the Son, yet a *Barony* does ſtill actually remain in the Father. That *Earldoms* as well as *Baronies* were originally Feudal, is certain; and every Tenure *per Comitatum* was to a *Tenure per Baroniam*, exactly as a *Tenure per Baroniam* was to *Knight-Service*; and therefore as every *Tenure per Baroniam* was a *Tenure by Knight-Service* and more, ſo likewiſe was a Tenure *per Comitatum* a *Tenure per Baroniam* and more, that is, as a *Tenure per Baroniam* imply'd *Knight-Service*, a Tenure *per Comitatum* did imply *Barony*: From whence a Reaſon may be gather'd of this Difference; for tho' the ſingle (perhaps) *Baron*

of an *Earl* be transferr'd to the Son, yet the *Earldom*, which implys a *Barony*, ſtill remains in the Father; and ſo was it underſtood in Antiquity, ſince the Word *Honor*, which as is before obſerv'd was Synonymous to *Barony*, was in the ſame Feudal Senſe apply'd to *Earldoms*, with this only Diſtinction, that it was call'd *Comitalis Honor*, as appears from this, that in the old Charters for the Creation of *Earls*, beſides the Annuity which was to be paid to them *nomine Comitatûs*, it was frequent to add a Clauſe to enable them to hold a great part of their Eſtates *ſub Comitali Honore*; by which thoſe Lands became, as it were, parcel of their *Earldoms*, which was the beſt way of Entailing, ſince thereby they became like their *Honors*, unalienable by their Heirs. As for Inſtance (not to multiply Precedents) in the Patent that paſs'd for creating *Henry Piercy* Earl of *Northumberland*, this Clauſe is inſerted, after the Grant of Twenty Pounds *nomine Comitatûs*; "Et quod omnia "Caſtra, &c. quæ ——— Jure Hæreditario vel ad- "quiſitione propriâ peranteà tenuit & poſſedit, vel "impoſterum eſt habiturus ſub *Honore Comitali*, & tan- "quam parcellæ dicti Comitatûs teneantur, &c."

Rot. Ch. 1 Ri. 2. n. 31.

But further, the Practice has been conformable to this Notion, tho' by the way it may be obſerv'd, that this Practice is not of a very old Date, ſince the firſt Inſtance of it was (if I am not much deceiv'd) in the 22d of *Ed.* IV. in favour of *Thomas Arundell*, Eldeſt Son to *Richard Fitz-Alan* Earl of *Arundel*, who was ſummon'd to Parliament by the Name of Lord *Maltravers*, and in his Caſe (which perhaps was the Foundation of their after Uſage) he is not placed as junior *Baron* upon the Liſts of Summons, but between the Lords *Zouch* and *Dacre* of *Gilleſland*; but as they were not then probably ſo nice in entring the Names of the *Peers* as they have been of later times, I ſhall not offer to infer any thing from it. The Summoning the Eldeſt Sons of Earls by Writ is ſo common, that it is needleſs to mention any of them; but the Eldeſt Sons of *Barons* have very rarely had that *Honor*, there being I believe but two, who were ever ſummon'd by Writ, both whoſe Fathers at the ſame time had in them ſeveral *Baronies*; the firſt of whom was *Will. Parker*, the Eldeſt Son of *Edward* Lord *Morly* and *Montegle*, by the Name of Lord *Montegle*, and in the Liſts of Summons he

Summ. 1 Jac. Re. 1.

he is plac'd between the Lords *Darcie de Darcie* and *Sandys de Vyne*. The ſecond was *Coniers Darcie*, Eldeſt Son of the Lord *Darcie, Meynill*, and *Conyers*, by the Name of Lord *Darcie*, and was upon his firſt Summons, which was *anno* 32 *Caroli* II. (I ſuppoſe thro' Miſtake) plac'd as junior *Baron* upon the Liſt; but in the Parliament of 1 *Jac* II. that Error is amended, for he is then entred between the Lords *Stourton* and *Cromwell*.

As to the Commoners to whom Writs have likewiſe been directed (unleſs they were ſome of the beforemention'd neglected *Barons by Tenure*,) there is no doubt but their Writs, if they became *Peers* in conſequence of them, muſt have operated by way of Creation. But then it ſtrongly appears, that that Method has not been much eſteem'd; for (as I believe) it is now above a hundred Years ſince any Man was made a *Peer* by that means; and as to thoſe who are ſuppos'd to have been created *Barons* by Writ before that time, it muſt be obſerv'd that all the antient Writs of Summons did conſtantly run "in Fide & Homagio "quibus nobis tenemini;" as *Dugdale* and all other Authors agree. But during the time that Phraſe was us'd, my Lord *Coke* and Sir *Henry Spelman* both aſſert the Perſons ſummon'd to Parliament as Peers, to have been undoubtedly *Barons* only by Tenure: And therefore (if that Obſervation be allow'd to be true) it demonſtrably follows, that there could not poſſibly be any *Barons* by Writ, in the Senſe the Term is now us'd, before the 25th of *Edward* III. ſince all the Writs antecedent to that time have that Phraſe regularly inſerted in them: Tho' if we conſider what has been before obſerv'd, that Homage was equally incident to a *Tenure per Baroniam*, and by common *Knight-Service*, and therefore the Writ might with the ſame Propriety be directed to them both, it manifeſtly appears, that the Direction of ſuch a Writ to any Man does not prove him to be a *Baron* at all, ſince it only ſuppoſes him to be a Tenant *in Capite* by one of the abovemention'd Services: And as to what my Lord Chief-Juſtice *Coke* further obſerves, that the Reaſon of changing that Clauſe into the other of *in Fide & Ligeanciâ*, was, becauſe the greateſt part of the Perſons ſummon'd after the 25th of *Ed.* III. were not Tenants *per Baroniam*, I cannot but doubt the Truth of it, ſince I believe no Man can ſhow, that ever any Man

4 Inſt. & in Gloſ.

was

was ſummon'd to Parliament by Writ, from the 49th of *Henry* III. until the 1ſt of *Hen.* VII. who was not a Tenant *per Baroniam*, or at leaſt in *Capite* by *Knight-Service*, and Conſequently the Phraſe *in Fide & Homagio*, was as applicable to every Man who was ſummon'd after the 25th of *Edward* III. as it was before.

But indeed after that Time the Phraſes ſeem to have been us'd indifferently, and as if they were Synonymous to each other. For ſometime the one Phraſe and ſometimes the other, are to be found in Writs directed to Perſons, who were undoubtedly *Barons by Tenure*. And then further, ſince that Time frequent Homages for *Dutchies*, *Earldoms* and *Baronies* are upon Record, to have been done by Perſons who were at other Times ſummon'd by the Phraſe, *In Fide & Ligeanciâ*. The Ceremony of it is kept up unto this Day, when upon a Coronation the *Peers* in a Body, are ſaid to do *Homage* to the King. Tho' the Biſhops are now the only Perſons who regularly do it upon Livery of their Temporalities, before they are admitted into the Houſe of Lords.———

Having in this Manner, as fully as the Limits preſcrib'd to this Diſcourſe wou'd permit, expreſs'd my Thoughts concerning *Barons* or *Peers*, both by *Tenure* and by *Writ*; It will be neceſſary before I can proceed to the Conſideration of *Peers* by *Patent*, to premiſe ſomething concerning that Prerogative, which the Crown has ſometimes claim'd, not only of Summoning thoſe Perſons to Parliament (as its Council) who were Tenants in *Capite* by Knight-Service, once or twice, and then neglecting them for the future, but alſo of Summoning in the ſame Manner, thoſe who were actually Tenants *per Baroniam*, ſometimes to one Parliament and ſometimes to another, and leaving them out of the Liſts of Summons afterwards whenever the King thought Convenient.

It has been already obſerv'd, that Attendance in Parliament, was Originally to be in a great Meaſure conſider'd, as a Service incident to the Tenure of Lands. And that upon the Defeat of the *Barons* at *Eveſham*, a Law was made by which no *Baron* had a Right to come to Parliament, unleſs he was ſummon'd by particular Writ; Which as it was the Occaſion of what was afterwards call'd *Barony by Writ*, ſo likewiſe the Practice which was for ſometime afterwards us'd,

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in Summoning the *Barons* to Parliament, was probably the Cauſe of Introducing *Barons* by *Patent*. The Clauſe in the above-mention'd *Magna Charta* of King *John* is, " Ad habendum commune concilium Regni, " faciemus ſummoneri Archiepiſcopos, Epiſcopos, " Abbates, Comites, & Majores Barones Regni ſigillatim per litteras noſtras." In which it is obſervable, that tho' the Archbiſhops, Biſhops, Abbots and Earls, are enacted to be conſtantly ſummon'd to Parliament, yet the Summoning of the *Barons* was left in ſome Uncertainty, by reaſon of its not being determin'd who ſhou'd, or who ſhou'd not be comprehended within the term of *Majores Barones*, which Uncertainty was perhaps the Foundation of thoſe Diſputes, that afterwards happen'd between the King and the *Barons*, upon account that all the *Majores Barones* were not ſummon'd. But however this Diſpute, if the Manuſcript Author before cited out of *Cambden* be depended to be on, was by the Succeſs of *Henry* the Third's Arms determin'd very much to the Advantage of the Crown, as appears by the Words before tranſcrib'd. By which (Statute as my Lord *Coke* calls it) it was enacted, that no *Earls*, or *Barons* Indefinitely ſhou'd come to Parliament, but only thoſe to whom the King ſhou'd direct particular Writs of Summons; by which Law it was pretended, that the determination of who were, or who were not, to be reckoned *inter Majores Barones*, was left abſolutely in the Power of the Crown. But the King's Succeſſors to *Hen.* III. carry'd it yet further, Explaining by it the Charter of King *John*; and claiming a Power to Summon *ad Arbitrium*, any *Tenant per Baroniam* to Parliament, without being by Law oblig'd to Summon him to any future Parliament; and the Writ accordingly (as is before obſerv'd) contains no Words in it, by which it was anciently underſtood that the Perſon ſummon'd, was created a *Parliamentary Baron* for Life, and much leſs to him and his Heirs. Thus *Henry Peverell* is upon the Liſts, as being once ſummon'd to Parliament in the 32d of *Edward* III. and was never ſummon'd again, tho' there were no leſs than four of that Name, who before the 49th of *Henry* III. were Tenants *per Baroniam*; ſo likewiſe *John de Veſci* was ſummon'd *inter Majores Barones* 49°. *Henry* III. (and whoſe *Barony* by *Tenure* is before-mention'd to have deſcended to Sir *Henry de Bromflete*) but whether

Dor. 14. apud Prynne.

whether he was ever ſummon'd again is uncertain, by reaſon the Rolls of Summons until his Death, which was in the 17th of *Edward* the Firſt, are loſt; however his Brother and Heir *William*, tho' forty Years of Age at the Death of *John*, was not ſummon'd until the 23d of *Edward* I. and was then not ſummon'd again until the 6th of *Edward* II, *&c.* many Inſtances of this Nature might be added, but theſe are ſufficient to let the Reader ſee, that the King not only claim'd, but alſo practis'd this Prerogative. But then it muſt be conſider'd, that the leaſt conſiderable of the *Barons* were always the Subjects of it, for there is no Inſtance of any *Earls* being ever omitted, nor indeed any very Conſiderable *Baron*. And they as they were the only Perſons who cou'd diſtreſs the King, (being ſure ſo long as their Power continu'd of being ſummon'd themſelves) never concern'd themſelves to remedy or redreſs the Injuries done to Perſons of leſs Conſequence, until they alſo began to be affected. And as for the others, they wou'd not complain, ſince during the firſt and middle Ages of our Monarchy, (and before that Methods were found out to make Men think a long and expenſive Attendance worth their while) the Privilege of attending now and then in Parliament, was not (nor cou'd it be) thought by a Man of a ſmall Income to be a ſufficient Equivalent, for the Burthen of thoſe other Services, that were Incident to a *Tenure per Baroniam.*

The Humor of our *Engliſh* Gentlemen, is certainly very much chang'd from what it antiently was; ſince formerly, Men were ſo far from being fond of coming to Parliament, that even thoſe who were actually ſummon'd, and by Virtue of their being Tenants in *Capite per Baroniam*, were oblig'd to attend, did ſo frequently abſent themſelves, that it was found neceſſary to paſs an Act of Parliament, more effectually to force People to attend in Obedience to their Summons. And therefore it is enacted by the 5th of *Richard* the Second, "That if any Perſon, which Cap. 4. "from henceforth ſhall have the ſaid Summons, be "he Arch-Biſhop, Biſhop, Abbot, Prior, Duke, Earl, "or Baron, *&c.* do abſent himſelf——he ſhall be "amerc'd and otherwiſe puniſh'd *&c.*" It is no Wonder therefore that it was Common for Perſons who were not conſiderable enough to diſpute with the

the Crown upon their being either inserted or left out of the Writs of Summons to Parliament, or who, tho' they might be summon'd, were not (upon other Accounts) very desirous of that Honour, to do all that lay in their Power, to suppress so much as the very Knowledge of their being *Tenants in Capite per Baroniam*. For those Tenants *per Baroniam*, who were never summon'd to Parliament as they were (as is before-mention'd) entituled to all the Privileges of *Barons*, as *e. g.* Exemption from serving on Juries, *&c.* which were not simply Incident to, and the pure Consequence of Attendance in Parliament, as *e. g.* their Domesticks being in Session Time free from Arrests, *&c.* so likewise were they bound to the performance of all *Baronial* Services whatsoever, excepting only that of Attendance in Parliament.

It is known that the Relief of *Earldoms* and *Baronies*, was uncertain until the Time of the Grand-Charter. As appears from *Glanvill*, "Dicitur ratio-"nabile Relevium alicujus juxta consuetudinem Reg-"ni de feodo unius Militis C. solid——de Bar-"oniis vero nihil certum statutum est." But yet notwithstanding that by the Charter of *Henry* III. the Relief of an *Earl* was setled at one hundred Pounds, and the Relief of a *Baron* at one hundred Marks, after that Time the *Barons* did frequently pay their Reliefs at one hundred Pounds. As for Example, in the Case of *William Longespye*, Son and Heir of *Ydonea*, a Tenant *per Baroniam*, "Et postea scrutatis Rotulis de "Scaccario inveniebatur quod prædicta Ydonea te-"nuit de Rege in Capite duas Baronias——Et "ideo consideratum est per Barones, quod prædictus "Willielmus respondeat Domino Regi de 100 lib. pro "Relevio suo." Now the Payment of this Relief was Common to all the Tenants *per Baroniam* (who were consequently all Equally *Barons* within the Charter of *Henry* the Third) without distinction whether they were summon'd to Parliament or not. But that it may not be said this hundred Pound Relief paid by *William Longespey*, was in the Confus'd Time of *Henry* the Third, I add, that in the Reign of *Edward* the First (our English *Justinian*, as he is call'd by my Lord C. J. *Coke*) the like Relief, contrary to the express Terms of *Magna Charta*, was paid, "Robertus

Mag. Chart. cap. 2. Lib. 9. cap. 4.

Mem. in Scacc. 40 H. 3. Rot. 12. b.

"Stirl

Mich. Communia, 14 Ed. 1. Rot 1. a. in bund 13. & 14 Ed. 1.

" filius Walteri qui habet in Uxorem Dervorgullam " unam filiarum & Hæredum Johannis de Burgo filii " & Hæredis Hawiſiæ de Launvaley, quæ de Rege " tenuit in Capite per Baroniam, dat Regi quinqua- " ginta Libras pro Relevio ſuo de Medietate Baroniæ " prædictæ " But this laſt Caſe does not only prove that in the Reign of *Edward* the Firſt, one hundred Pound was paid for Relief inſtead of one hundred Marks, but alſo that it was paid by Perſons who were not (at leaſt regularly) ſummon'd to Parliament; for this *Robert Fitz Walter* was not ſummon'd until the 23d of *Edward* the Firſt, that is nine Years after this Payment. Since in the Year preceding, *viz.* the 22d of *Edward* the Firſt, his Name is not to be found upon the Liſt of Summons.

I believe I need not multiply Precedents to prove this Point, ſince the Reader will eaſily believe, that tho' the King was willing enough not to be troubled with more of them in Parliament, than ſuch as he ſhou'd think particularly to ſummon by Writ, that yet he was not inclin'd to releaſe to thoſe Tenants *per Baroniam*, whom he did not ſummon, any part of their other *Baronial* Services, nor (much leſs) to relinquiſh any Method which the Crown was poſſeſs'd of, for raiſing Money from them. As it wou'd ſwell this Diſcourſe to too great a Length, I wave the entring into the detail of thoſe Reaſons, which might engage all thoſe Tenants *per Baroniam*, who had no Proſpect of being regularly ſummon'd to Parliament, *inter Barones Majores*, or who if they were now and then ſummon'd, the very Attendance even in Parliament, was a Burthen to them, to deſire the Extinguiſhment of ſo much as the Knowledge of their being *Tenants per Baroniam*, and to be conſequently deliver'd from all thoſe burthenſom Services that were Incident to that Tenure.——

As this Prerogative therefore which the King exerciſ'd of Summoning a Man as a *Baron* for two or three Parliaments, and then, *ad arbitrium*, to leave him out of the Liſts of Summons for the future; inclin'd the Indigent and every way *minores Barones*, to get rid of their *Tenure per Baroniam*, ſo on the other Hand it engag'd the *Barons* of better Fortunes, and more Powerful Families, to think of ſome Method to prevent their being neglected, and to engage the Crown in ſuch a Manner

Manner as that, without diſputing the Legality of the above-mention'd Prerogative, the King might be under a Legal Neceſſity of Conſtantly ſummoning them to all Parliaments. And this perhaps was the firſt Original of Patents: Which they underſtood to be (as it were) in the Nature of a Recognition upon Record on the part of the Crown, of their being *Inter Majores Baronet*, and that conſequently they had a Right to be conſtantly ſummon'd to all Parliaments. But however, as this is a Speculation that I can only mention as probable, having not ſeen Facts ſufficient to enable me to evince the Truth of it, I ſhall not now ſay more of it; but proceed to what I think more certain in relation to our *Barons* by *Patent*.

And under this Head likewiſe of Barons by Patent, my firſt Enquiry will terminate at the Beginning of the Reign of *Henry* the Seventh, ſince it will be neceſſary for me afterwards to take ſome ſhort notice of thoſe Alterations, which ſince his Time have been introduc'd into the *Peerage*; and of which he laid the firſt Foundations, and ſome of his Succeſſors have practis'd in ſuch a Manner as that they have become a Grievance. But as to the Patents that paſs'd before the Acceſſion of *Henry* the Seventh, (moſt of which that are extant, or elſe atteſted Copies of them, taken from and collated with the Records, I have both ſeen and perus'd) this Preliminary Obſervation and Diſtinction muſt be made, *viz.* That they are either Patents creating Perſons who were *Barons* before, *Viſcounts* or *Earls*, &c. or elſe they are Patents creating Perſons *Barons*, or *per ſaltum Viſcounts* or *Earls*, &c who were perfect Commoners before. The reaſon of which Diſtinction is, that I think a great Difference is to be made between thoſe Patents, which only grant to a Man who is already a *Peer* or *Baron*, an Advancement in the *Peerage*, and thoſe which being made to mere Commoners are Introductory of new *Peerages*. For the Body of the *Peers* are manifeſtly much more concern'd in the laſt of theſe, than in the firſt.

It is ſo long ſince our Nobility has ceas'd to be Feudal, that the very Notion of an Officiary *Earl* is almoſt loſt in *England*, tho' yet the Privileges of thoſe Perſons whoſe Titles are ſingly owing to their Patents, are founded upon the Conſtitution, as it was

fram'd and underſtood by their Feudal Predeceſſors. Now as *Dukes*, *Marquiſſes* and *Viſcounts*, are but Modern Titles in Compariſon of *Earls* and *Barons*, I ſhall chiefly conſider, only the Patents by which the two laſt were created, ſince the Right of creating the others will naturally be determin'd by the ſame Rules and Methods of Proceeding, in which the Prerogative of making *Earls* and *Barons* was exercis'd. That an Earldom was Originally Officiary and Feudal (that is ſince the Conqueſt) is certain; and his Office by the Common Law was (as my Lord *Coke* ſays) to be the Great Conſervator of the Peace in his County. And as *Baron* and *Barony*, ſo alſo were *Count* or *Earl*, and County not only Correlative Terms but Things, nor cou'd one properly ſubſiſt without the other. And while *Earldoms* were upon this Officiary Foot, as it highly concern'd the Inhabitants of their reſpective Counties, that they ſhou'd not too much depend upon the Prince, ſo their Fees or Salaries were not precarious nor deriv'd from the good Pleaſure of the Crown, but conſiſted of the third part of the Profits of the Pleas, *&c.* of their Counties, to which by Common Law, and *qua Comites*, they were entitled. Nor was it an inconſiderable Sum in thoſe Times, when as my Lord C. J. *Hales* obſerves, the Buſineſs of the County Courts was not ſubſtracted from them, but Fines were there levied, *Poſt fines*, *fines pro licencia concordandi*, *pro Inquiſitionibus habendis*, &c. the Profits ariſing from all which, made part of the Sheriffs Term *de proficuis Comitatûs*. Before the Conqueſt, theſe Offices were at moſt but for term of Life, but by the Conqueror they were made Feudal and Hereditary, but without the Introduction of any other Difference; for the Office ſtill continu'd the ſame, and if we conſider the Extant Grants of Earldoms, that paſs'd during a long Time after his Reign, we ſhall find that the *tertius denarius* was conſider'd in Law, as it were Eſſential to the Dignity of an *Earl*.

Nevill's Caſe.

Hiſt. of the Law.

Earldoms and Baronies were by Intendment of Law (as is before obſerv'd out of the Mirror of Juſtices) eſtabliſh'd for the Defence of the Realm; and the Feudal Nations had no more Notion, after they were form'd into a Civil Government, that a Kingdom could ſubſiſt without *Earls* and *Barons*, than they had while they were but the Body of an Army, that their Conqueſts

queſts could be carried on, and a proper Diſcipline maintain'd among them, without General and other Subordinate Officers. And therefore when any *Earldoms* or *Baronies* eſcheated, the King had not only (as is above mention'd) a Right to grant them to other Perſons, but was in all probability under the ſame Neceſſity and Obligation to do it, as while he was as yet conſider'd but only as a General or Commander in Chief, he was under to fill up the vacant Commiſſions of Officers in his Army. But to return to our Officiary *Earldoms*; the King did not antiently grant *Nomen, Stilum & Titulum Comitis*, but *ipſum Comitatum*; by which Words the *tertius Denarius unde Comites erant* (as it is expreſs'd in ſome old Charters) did paſs by Operation of Law, without any expreſs Words for the Grant of it. But here I think it may be obſerv'd, that there are but very few Patents (that is not above ſeventeen or eighteen) extant antecedent to the 11th of *Edw.* III. all of which are of Feudal Earldoms; for as yet the Creation of *Barons* by Patent had not been thought of, but the Livery of Lands, *&c.* held *per Baroniam*, and the receiving the Homage of the Tenant (which all together made a Ceremony ſomething like the Modern *German* Inveſtitures) was all that went to the making a *Baron*. The ſix firſt of theſe antient Patents, that is, from the Grant of the Empreſs *Maud* to *Geofroy de Magnavillâ* of the Earldom of *Eſſex*, unto the firſt of King *John*, have the *tertius Denarius* regularly inſerted in them; and in particular, that of the Earldom of *Eſſex* has theſe remarkable Words, which make us know, beyond all poſſibility of Doubt, how the Law was underſtood in thoſe times: "Ego Matildis, *&c.* —— Do & Concedo Apud Sel.
"Gaufredo de Magnavilla —— ut ſit Comes de
"Eſſexiâ, *& habeat tertium Denarium Vice-Comitatûs de*
"*Placitis, ſicut Comes habere debet in Comitatu ſuo*, &c."
King *John* firſt introduc'd another Method of creating Earls, tho' yet he preſerv'd them Officiary, the only Difference that he made relating wholly to the third part of the Profits of the Counties, which he thought too much to be granted away; and therefore ſome little Lawyer of that Age invented the Method of granting ten or twenty Pounds *percipiend' de tertio denario Comitatûs* in lieu of it, thereby reſerving to himſelf all the other Profits of the County.

But

But then it is remarkable, that in this Grant of King *John*, which was in the first Year of his Reign, to *Humphry de Bohun Earl of Hereford*, there is as it were a tacit Confession of its not being entirely Legal and and Regular; for the King (jealous lest the Law should adjudge his Grant of the Earldom to be good, and the Reservation of the Profits to himself void, and that the Earl might notwithstanding be entitled to, and claim the third Part of the Profits of his County) took collateral Security from the Earl, that he should never in the Right of his Earldom claim any thing more than the twenty Pounds expresly granted to him in the Patent, as appears from the following Words recited in the Preamble to it; "Et "ipse nobis Chartam suam fecit, quod ipse vel Hæ- "des sui nihil clamabunt unquam de nobis vel Hæ- "redibus nostris." All the rest of the Patents, during the before-mention'd time, are also Feudal and Officiary, and the *tertius Denarius* still granted in some; but by the others it may be observ'd, that the Example set by King *John* was thought fit to be imitated by his Successors: But yet after all, that could not well be consider'd otherwise than as a Slight of Law; for even after that time the Opinion of *Earl* and *Earldoms* being necessarily relative to one another, continu'd for some Ages in the World; and therefore the Grant of this Money (which at this Day is call'd Creation-Money) was in the old Grants so worded, as that it might, if possible, be consider'd in Law *sub ratione tertii Denarii*; for which Reason it was made payable out of that third part of the Profits of the County, which of Right ought to have belong'd to the *Earl*. This it was that made the *Comitalis Honor*; tho' sometimes the Patentees would, after that the *Earls* were stripp'd of their *tertius Denarius*, for the better Support of their Dignity, get their Lands to be annex'd to, and made parcel of it. Till the eleventh of *Edw.* III. this Money was almost constantly made payable out of the Profits of the County, of which the Patentee was made *Earl*; as in the Patent to *Robert de Ufford Earl of Suffolk*, his Grant of twenty Pounds is, "Percipiend' de Exitibus Comitat' predict' "*sub Nomine & Honore Comitis Suffolciæ*;" but since that time the Method (which at last has universally prevail'd) is to grant some small Annuity for the better

Rot. Ch. 1 Jo. p. 2. n. 177.

Rot. Ch. 11 Ed. 3. n. 52.

better Support of the Dignity, payable at the Exchequer. It would be endleſs to enumerate the various Forms, that have been us'd in the Creation of this ſort of Earls; but the Reader, who deſires to be more fully inform'd of it, may conſult the Learned Mr. *Selden*'s elaborate Treatiſe *of Titles of Honor*. Beſides, it muſt be obſerv'd, that the Method us'd in the Creation of the other *Earls*, *&c.* who were not ſo exactly Feudal, is much more to the purpoſe of what we are now ſpeaking.

It is a known Privilege of the *Lords*, that they are not tryable otherwiſe than by their *Peers*, but there is this remarkable Difference between their Tryal *per Pares* and that of Commoners, that they cannot challenge any of the Perſons by whom they are to be try'd; from whence it ſeems manifeſtly to follow, that every ſingle Lord is much more concern'd in Intereſt in the Creation of a new Peer, than he poſſibly could be in the Queſtion, whether an Honor could be ſurrendred, or not; and yet that Queſtion was reſolv'd by the Houſe in the Negative, upon Conſideration, that every Lord, and even the whole Kingdom, was concern'd in the Extinguiſhment by Surrender, Fine, *&c.* of every Lordſhip. The Admiſſion of all new Tenants in any common ordinary Manor was always tranſacted in the Preſence of the other Tenants of the Manor, who antiently had a Negative upon every Man who was propos'd by the Lord to be admitted; which is exactly conſonant even to the very Text of the Feudal Law, "Ad probandam novam Inveſtituram, ſemper Pares Curiæ ſunt neceſſarii; & ſi ſine eis facta ſit Inveſtitura, etiamſi Dominus confiteatur factam: Quia tamen ſine hac Solemnitate facta eſt, non valet, etiamſi probari poſſit per breve Teſtatum." The Reaſon of which was, that every Tenant of a Manor was in all Feudal Controverſies, between himſelf and any other Tenant of the ſame *Manor*, to be bound by the Judgment of the Tenants of the Manor, and therefore was it reaſonable, that he ſhould be conſulted in the Admiſſion of Perſons who were to be his Judges. How far any thing of this Nature may be apply'd to the Houſe of Lords, which is (as before is obſerv'd) the Great *Court Baron* of the Kingdom, I muſt leave to every Reader

Vid. Purbecke's Caſe.

Feud. lib. 2. tit. 32.

Reader himſelf to judge, after that he has perus'd what will further be added upon this Subject.

8 Report. It is very common for antient Statutes to be in the Form of Patents; and in the Prince's Caſe, where this Matter is at large explain'd, it is reſolv'd, that all Patents which paſs the Great Seal, and are ſubſcrib'd *de authoritate Parliamenti*, or *per ipſum Regem in Parliamento*, have the full Strength and Authority of Acts of Parliament: Now the Reſolution of that Caſe being undoubtedly Law, I cannot but own my ſelf to have been very much ſurpriz'd, when, upon Inſpection of the various Creations of *Peers* that paſs'd between the eleventh of *Edw.* III. and the firſt of *Henry* VII. I found them (I think) almoſt all (except ſome that were Grants of Eſcheated Feudal *Honors*, and even the moſt part of them were ſo alſo) to have been made and paſs'd by the Authority of, and in full, Parliament. I believe that upon this Occaſion ſome of my Readers will be as much ſurpriz'd as I was; for which Reaſon therefore, and alſo that they may the better judge, in what manner this Prerogative of creating Peers by Patent was originally exercis'd, I ſhall mention ſome of the moſt remarkable Circumſtances that I obſerv'd of ſeveral Patents that were paſs'd in each Reign.

Rot. Ch. 11 Ed. 3. n. 34. In the eleventh of *Edward* III. *Henry* of *Lancaſter* was made Earl of *Derby*, according to the expreſs Words of the Patent, *de definito dicti Parliamenti conſilio.*

Rot. Ch. 11 Ed. 3. m. 23. n. 41, 49, §2, 60. And in the ſame Year *William de Clynton* was made Earl of *Huntingdon*, *William de Bohun* Earl of *Northampton*, *Robert de Ufford* Earl of *Suffolk*, and *Edward* Duke of *Cornwall*, all of them by Aſſent of Parliament, *de aſſenſu & conſilio Prælatorum, Comitum, Baronum & aliorum de Concilio noſtro in præſenti Parliamento.*

It is remarkable of *Edward* III. that in order to ſtrengthen his Intereſt, and carry on his Deſigns in *France*, he married his Daughter *Iſabel* to a *French* Nobleman call'd the *Baron de Coucy*, (and had actually treated for the Marriage of another with the Sire *de Albret*.) Now (after his Marriage) the King even apply'd to Parliament, to be enabled to make him a *Peer* of *England*, which could not be, becauſe the *Baron* was a Foreigner, ſince he had a very large Eſtate in Land in *England*: But what makes this Caſe the more remarkable is, that the particular Conſent of each ſingle

Lord

Lord was ask'd, as appears by the following Words of the Parliament-Roll, " ——— Les Prelatz, Dues, " Counts, Barons, &c. eſteantz en la chambre blanche " luez devant eux meſmes les ordenances & aſſents, " le Chanceller monſtra a les Grantz & Communes, " coment le Roy avoit mariez ſa fille Izabelle a Seig- " neur de Coucy, qi avoit belles terres en Angle- " terre & aillours, & per cauſe il eſtoit ſi pres ſon al- " liee il ſerroit ſeant au Roy de luy —— nomer & " faire Counte, & eſtoit demande a eux lour avys & " aſſent ; Queux *Grauntz cheſcun per ſoy*, & les Com- " muns de un' Aſſent, accorderent, &c. The *Baron* was afterwards made Earl of *Bedford*, but yet by the Patent which paſs'd, it would be impoſſible to diſcover whether the Parliament had been conſulted in it, or not. Upon which Account, and ſome other Inſtances of the like Nature, it may not be unreaſonable to believe, that all the Patents of Earldoms, &c. were, during this Period of time, paſs'd in Parliament, notwithſtanding that there are ſome few Patents paſs'd, in which the Parliament is not mention'd, ſince (if I am not miſtaken) there are not above ten of thoſe, to above one hundred of the other Sort ; and of thoſe ten, not one during the long Reign of *Ed.* III.

Rot. Parl. 40 Ed. 3. m. 13.

Rot. Ch. 39 & 40 E. 3. n. 12.

In the Reign of *Richard* II. above thirty Perſons were made Dukes or Earls, " *de Aſſenſu Prælatorum, Ducum, Comitum, Baronum & Communitatis Regni in Parliamento* ; " and what is very remarkable, his Uncle, *Thomas* Earl of *Wodeſtoke*, who in the firſt Year of his Reign had been created Earl of *Bucks* without Parliament, in the 14th Year of his Reign, had a new Patent paſs'd for the ſame Earldom, which is ſaid in the Patent to be for the Security of his ſaid Uncle ; " Nos *pro Securitate* ipſius Avnculi noſtri Thomæ, &c. " ac de aſſenſu & conſilio omnium Prælatorum, Mag- " natum & Procerum, &c. — ac aliorum de conſilio " noſtro —— necnon ad ſpecialem requiſitionem & " de aſſenſu totius Communitatis ejuſdem Regni no- " ſtri in Parliamento, &c.

Rot. Ch. 14 R. 2. n. 5.

In the Reign of *Henry* IV. there were but two Patents, of which one was to *Thomas of Beaufort*, his Brother, creating him Earl of *Dorſet*, the other to his Son *Thomas of Lancaſter*, of the Earldom of *Albe-*

Rot. Ch. 13 & 14 H. 4. p. 1. n. 2, 3.

marle and Dutchy of *Clarence*; and therefore conſidering how near thoſe two Princes were related to the Crown, it is no ways ſurprizing, that the Conſent of Parliament is not particularly mention'd in the Patents. But here I would obſerve to the Reader, that when I mention any Patents wherein the Parliament is not mention'd, all that I can do is, not to *affirm* them to have been paſs'd in Parliament, ſince I muſt own that I think it more than probable, that they were alſo paſs'd; it often happening, that by the Parliament-Rolls it ſhall appear, many Patents were paſs'd in Parliament, in which however no Mention is made of the Parliament; ſo that if the Parliament-Roll ſhould happen to be loſt, it would be for ever impoſſible to ſhow, the Parliament was any ways concern'd in the paſſing them.

The braveſt of our Princes have always preſerv'd the beſt Underſtanding with their Parliaments, and therefore the Patents of Peerage, which were paſs'd by *Henry* V. (excepting only one Patent of Reſtitution to *Henry Piercy* Earl of *Northumberland*, and another of the Feudal County of *Richmond* to *John of Lancaſter*, "*Caſtri, Comitatûs, Honoris, & Dominii de Richemonde*") were all paſs'd in Parliament; as appears from the Entries upon the Rolls of Parliament, of which not to multiply Precedents, this is one Inſtance; "Item "fait aſſavori que noſtre treſſoverain Seigneur le "Roy, ſeiant en Parlement, en ſa ſee Royalle a la "requeſte des Seigneurs Spirituels & Temporels, & "de ſes Communes en meſme le Parlement aſſemblez, "creaſt & preſiſt Johan. de Lancaſtre, ſon Frere, en "Count de Kendale & Duc de Bedeford, & Humfry "de Lancaſtre, ſon autre Frere, en Count de Pem-"broke & Duc de Glouceſtre, *&c.*" But I cannot quit the Reign of *Henry* V. without obſerving, that this Paſſage out of the Rolls does in ſome meaſure juſtify what I have before ſaid (by way of Diſtinction) of *Feudal and Honorary Earldoms*; for it appears, that in the ſame Year in which *Henry* V. by *Parliament* created his Brother Duke of *Glouceſtre*, he without Parliament granted him the *Feudal County of Richemonde*.

Rot. Pat. 2 H. 5. p. 2. m 2. Rot. Ch. 3 & 4 H. 5. n. 6.

Rot. Par. 2 H. 5. p. 1. n. 8. Rot. Pat. 2 H. 5. p. 1. m. 36, *&c.*

In the Reign of *Henry* VI. likewiſe above twenty Patents for the Creation of *Dukes, Earls, &c.* were paſs'd

paſs'd in Parliament; and, as I before obſerv'd that many Patents appear by the Parliament-Rolls to have been paſs'd in Parliament, in which no Mention of the Parliament is made, ſo here it muſt be obſerv'd, that upon the Patent-Rolls it appears, that many Patents were paſs'd in Parliament, of which no Mention is made upon the extant Rolls of Parliament; both which being conſider'd together ſeem to make it ſtill more probable, that all Patents of this Nature were paſs'd *de Authoritate Parliamenti*: I could mention a great Number of them, (was it neceſſary) which appear not upon the Parliament-Rolls, which yet are all ſubſcrib'd, *per breve de privato ſigillo & de datâ prædictâ authoritate Parliamenti.*

In *Edward* the fourth's Reign alſo, to conclude this Head, there are above a dozen Patents of this Nature, which by their Subſcription appear to have been paſs'd by Authority of Parliament; but what is ſomething remarkable in this Reign is, that in one Patent, by which *John*, the King's Brother's Son, was created Earl of *Lincoln*, the Parliament not being concern'd in the Creation, a Clauſe of *non obſtante* any Cuſtom or Uſage to the contrary (which Clauſe I take to be the firſt of the kind) is inſerted into it. Rot. Ch. 7 Ed. 4. n. 40.

From what has been now ſaid in relation to the creating of Earldoms, *&c.* I think I need not go about to draw any Concluſions, but leave it to every Reader to judge what the natural Conſequence is. Now if this was the Caſe in relation to Patents, by which an Advancement only in the *Peerage* was granted, it may well be expected, that the ſame Method was alſo obſerv'd in the creating of *Barons*, by which the Voters in the Houſe of Lords were increas'd, and every particular Lord had a new *unchallengeable Judge* impos'd upon him. Nor does the Practice deceive our Expectation, for during all that time, that is, from the 49th of *Henry* III. unto the firſt of *Henry* VII. (whatever Exception there may be to the contrary as to Earldoms) there is not one Inſtance (unleſs the firſt be allow'd to be ſo) of a *Baron*'s being created by Patent otherwiſe than in Parliament: And indeed it ſeems reaſonable that it ſhould be ſo; for a *Barony* (as before is obſerv'd) was originally founded altogether upon *Realty*, and all the Dignity and Privileges of the Lords

were deriv'd from their being Tenants *per Baroniam*: What leſs therefore, than a Patent paſs'd in Parliament, can make a Man, who was not a Tenant *per Baroniam*, be conſider'd in Law as if he was; for ſuch was the Effect and Operation of their *Patents*: And the *Lords*, even unto this Day, notwithſtanding that all *Baronial* Services, *&c.* are by Statute taken away, muſt in a great many Particulars be conſider'd as ſuch. But I forbear entring further into any Conſiderations of this Nature, and proceed to give an Account of thoſe Patents that have been paſs'd for the Creation of *Barons*, and the Reader will perhaps be again ſurpriz'd, when I tell him, that during all that time there were but fifteen Patents paſs'd for that Purpoſe.

Rot. Pat. 11 Ric. 2. p. 1. m. 12. The firſt Perſon (as every Body knows) who was created a *Baron* by Patent, was *John de Beauchampe* in 11 *Rich.* II. but then it is remarkable, that he never ſat in Parliament as a *Baron*; (tho' his Name is upon the Liſts of Summons to Parliament in the Year of his Creation (for in that very Parliament he was attainted, as being one of the Accomplices of the Earl of *Suffolk*, and Duke of *Ireland*, *&c.* beſides which it is alſo to be obſerv'd, that when his Patent paſs'd, *Michael de la Pole* had the Keeping of the Great-Seal, and for that Reaſon his Patent could never have been allow'd in Parliament; for in the Parliament held in the preceding Year, the Great Seal had been taken away from *Michael de la Pole*, and he was declar'd incapable of ever having it again; and therefore one of the Articles againſt this *John de Beauchampe* was, that he had counſell'd the King, contrary to the Declaration of Parliament, to give the Seals again to him, *viz.* "Item

Rot. Parl. 11 Ric. 2. "la ou a Darrein Parlement ——— Michel de la "Pole pur diverſes Cauſes deſhoneſtes ——— feuſt "diſcharge del Office de Chanceller & le Grant Sele "le Roy feuſt pris de luy les dits (of which *John de* "*Beauchampe* is one) luy fiſt reavoir le Grant Sele—— "Quel feuſt Subverſion de toute la ley du Royaulme, "*&c.*" This Patent therefore was no other than a vain Attempt for the Creation of a *Baron*, which never took Place; nor was he ever more ſummon'd to Parliament, but in ſome few Years afterwards executed. Another Reaſon alſo of the Animoſity the Barons ſhow'd againſt this *John de Beauchamp*, was, his being

being a Confederate with Sir *Nicholas Brembre*, Mayor of *London*, in whoſe Favour that weak Prince *Richard* the Second had intended to change the Name of the City, and to create him Duke of *New-Troy*. Hic ſi " Vixiſſet, (ſays *Henry de Knighton*) Dux *Trojæ* per Re- Knighton " gem factus fuiſſet. Nam ab Antiquo Civitas Lon- inter de- " donienſis, *Troia minor* vocata eſt. Et ſic Dux de cem Scr. " Londoniis eſſet mutato Nomine Londoniarum in p. 2727. " nomen *Trojæ*. ———

2. The ſecond *Baron* who was created by Patent, was Sir *John Cornwall*, in whoſe Patent (for the firſt Time at leaſt that I have ſeen) the Phraſe of the three Rot. Pat. States of Parliament is us'd. " In trium ſtatuum 11 H. 6. " ejuſdem Parliamenti præſentiâ de gratiâ ſuâ ſpeci- p. 1. m. 16. " ali & ex certâ ſcientiâ ſuâ ac de Adviſamento & " conſenſu Ducis Glouceſter' & Cardinalis Winton' ac " cæterorum Dominorum Spiritualium & Tempora- " lium in Parliamento.

3. The third was Sir *Ralph Botiller*, who was cre- Rot. Pat. ated Baron of *Sudley*, " De adviſamento concilii no- 20 H. 6. " ſtri, *&c.* and the Patent was paſs'd, ' Per breve de m. 29. " privato ſigillo & de datâ prædict. authoritate Par- " liamenti.

4. In the Parliament Roll of the 20th of *Henry* the Rot. Parl. Sixth, there is a *Memorandum* of the King's having alſo 20 H. 6. created the above-mention'd Sir *John Cornwall*, Baron n. 10. of *Milbroke*, " De aviſamento & Conſenſu Domino- " rum, *&c.* creavimus, *&c.* in *Baronem Indigenam* Reg- " ni ſui Angliæ per nomen, *&c. Baronis* de Milbroke.

5. The fifth was in favour of *John Talbot*, Son of Rot. Cart. the Earl of *Salop* by *Margaret* his ſecond Wife, eldeſt 21 & 22 Daughter and Co-heireſs of *Richard* Earl of *Warwick*, H. 6. n. 23. by *Elizabeth* his Wife, the Daughter and Heir of *Margaret* (the Wife of *Thomas* Lord *Berkeley*) who was the Daughter and Heir of *Warin* Lord *Liſle*. The Patent is *per breve de privato ſigillo & de Authoritate Parliamenti*, and is to this purpoſe. " Nos nedum Præmiſ- " ſa—verumentiam qualitèr præfatus Warinus & om- " nes Anteceſſores ſui ratione Dominii & Manerii " prædict. (ſ. Kingeſton Liſle in Com Berkes) no- " men & Dignitatem Baronis & Domini de Liſle a tem- " pore quo Memoria hominum non exiſtit, optinue- " runt & habuerunt, Ipſe & omnes Succeſſores ſui ab " eodem tempore per hujuſmodi nomen loca & Seſſi-

" ones

" ones & alias præeminentias in Parliamentis, & con-
" ciliis Regiis ut cæteri Barones Regni Angliæ a toto
" tempore prædicto habuerunt & optinuerunt. ——
" Ne propter temporis prolixitatem aut Succeſſionis
" variationem aliove modo de hujuſmodi ſtylo, no-
" mine, & Dignitate dubitari poſſet. —— And then reciting that the ſaid *Barony* or Manor of *Kingeſton Liſle*, was by the conſent of his Mother in the poſſeſſion of the ſaid *John Talbot*, it follows, " Ad remo-
" vendum omnem Dubitationis ſcrupulum ipſum, *&c.*
" creamus, *&c.* It is to be obſerv'd that this *Barony* was altogether Feudal, and therefore (conſidering what has been before ſaid) the reaſon why the Authority of Parliament was wanting in this Caſe may poſſibly be, that his Mother being then alive, the *Barony* was actually in her; and cou'd not be transferr'd to the Son otherwiſe than by Parliament.

Rot. Pat. 25 H. 6. p. 2. m. 33. 6. The ſixth was Sir *John Beauchampe*, who by Patent was created *Baron Beauchampe* of *Bowyche*.

Rot. Pat. 26 H. 6. p. 2. m. 6. 7. The ſeventh was Sir *John Stourton*, who was created *Baron Stourton*.

ibid. m. 23. 8. The eighth was Sir *Thomas Hoo*, by the Name of *Baron Hoo de Haſtyng*.

ibid. m. 4. 9. The ninth was Sir *Richard Wydville*, by the Name of *Baron* and *Lord Ryvers*.

Rot. Cart. 28 H. 6. n. 35. 10. The tenth was Sir *Thomas Grey*, by the Name of *Baron* of *Richmonde Grey*.

Rot. Pat. 28 H. 6. p. 1. m. 10. 11. The eleventh was Sir *Thomas Percy*, by the Style of *Baron* of *Egremont*.

Rot. Pat. 37 H. 6. p. 1. m. 20. 12. The twelfth was Sir *Richard Fenys*, who in the Right of his Wife *Johanna*, Daughter and Heir of *Thomas*, the eldeſt Son and Heir of the Lord *Dacre* is declar'd, *&c.* Lord *Dacre*.

Rot. Pat. 4 Ed. 4. p. 1. m. 17. 13. The thirteenth was Sir *Humphry Stafford*, by the Name of *Baron Southwyke*.

Rot. Pat. 5 Ed. 4. p. 1. m. 6. 14. The fourteenth was Sir *Walter Blount*, by the Name of Lord *Mountjoy*.

15 Ed. 4. 15. The fifteenth was Sir *Edward Grey*, who in the Right of his Wife, the Siſter and Heir of the beforemention'd *John* Lord *Talbot*, was declar'd *Lord Liſle*.

I believe theſe are all the Patents for *Baronies* that were paſs'd before the firſt of *Henry* the Seventh, and they are all paſs'd *per breve de privato ſigillo & de Authoritate Parliamenti*, and conſequently had all of them the

the force of Acts of Parliament. It is likewiſe further to be obſerv'd, that in every one of theſe Patents (except two or three) there are Words which either expreſly, or by the ſtrongeſt Implication imply a Right to demand a Writ of Summons to all future Parliaments. Since the middle of the Reign of *Henry* the Eighth, a particular Clauſe has been conſtantly inſerted for this purpoſe, " Dictus A. B. & Hæredes, *&c.* " & eorum Quilibet habeat teneat & poſſideat ſedem, " locum, & Vocem in Parliamentis publicis Comitiis " & conſiliis noſtris, *&c.* inter alios *Barones*, ut *Barones Parlamentorum*, &c. The conſtant Uſe of this or the like Clauſe, which is almoſt as old as the creation of *Barons* by Patent itſelf, does in ſome meaſure juſtify what I before obſerv'd in relation to *Barons* by Tenure, *viz.* that tho' every Lord of Parliament was a *Baron*, yet every *Baron* was not a Lord of Parliament; but what further evinces that for ſome time even after *Henry* the Seventh, the Notion prevail'd, or rather ſtill continu'd, that a Seat in Parliament was perfectly diſtinct from *Barony*, is, that if a Man was by Patent created a *Baron* without a Clauſe in it, granting him a Seat and Voice in Parliament, he had not a Right to demand a Writ of Summons. At leaſt two ſuch *Barons* have been by Patent created, one by *Henry* the Eighth, by Name *Robert Curſon*, who had before been created a *Baron* of the Empire by the Emperor *Maximilian*, the other by King *James* the Firſt, whoſe Name was *Thomas Arundel*, and who likewiſe had been created a *Baron* of the Empire. Theſe two Gentlemen ſeem to have been pretty much in the Caſe of the above-mention'd *Barones Minores*; they were *Barons* to all Intents and Purpoſes, and wanted nothing but a Writ to make them Lords of Parliament.

I believe it no ways neceſſary to make any particular Remarks, upon the Patents of *Honor* that were paſs'd during the Reigns of *Henry* the Seventh and Eighth, *Edward* the Sixth, Queen *Mary* and Queen *Elizabeth*: Since every one knows that from the Reign of *Henry* the Seventh, the Crown has got ground in this reſpect, and gone on ſtill more and more to exerciſe the Prerogative of creating Peers. It is Notorious that in Parliament, each Branch of the Legiſlature are poſſeſs'd of what may be call'd *Peculiars*.

That

That is, that Laws of a particular Nature, do not regularly nor according to the eſtabliſh'd Courſe of Parliamentary Proceedings, take their Riſe or Commencement, but in one Houſe or the other, according to the Tendency of the Bill propoſed. Thus (for Inſtance) a Money Bill, a Bill for regulating Elections, *&c.* always begins in the Houſe of Commons, and on the other Hand, Bills relating particularly to the Peers, as for Inſtance, the now depending *Bill* of *Peerage*, &c. are as conſtantly begun in the Houſe of Lords. And Acts of Grace, general Pardon, *&c.* do with the ſame Regularity always receive their firſt beginning from the Crown. Which Method of Proceeding does in no wiſe abridge or limit the Power of refuſing the Bill propos'd, which is, and always muſt be in the other Branches of the Legiſlature. I have taken notice of theſe Particulars, becauſe from what has been before ſaid, upon the Subject of *Patents* for *Baronies*, conſtantly paſſing in Parliament, it ſeems not an unlikely Suppoſition, that during the Time theſe Parliamentary Patents were the conſtant Uſage, that they were of the Nature of Acts of Grace, that is, that tho' they cou'd be propos'd but only by the King as the Fountain of Honor, yet the Lords had perhaps a Negative upon all Patents of that Nature, juſt as they now have upon all Acts of Grace. The Reader muſt judge how far the preſent Cuſtom of all Patents being firſt read in the Houſe of Lords, before the Patentees are admitted to Act as *Barons*, does ſeem to favour the Notion. But if the Lords ever had ſuch a Right, I own myſelf Ignorant of any Law by which they cou'd have loſt it. It is true however, that they have not for more than this hundred Years exercis'd it, and (with whatever Intention ſeveral Peers may poſſibly have been created) by their admitting of all new created Peers into their Houſe, they have conſented as a Body to their Peerage, and actually given them a Parliamentary Right and Title to their Honors.

The greateſt Change that ever happened in the Conſtitution of *England*, was in the Reign of *Henry* the Seventh. Nor is there any ſtronger Inſtance of the Truth of that Maxim, that *Power is really founded upon and Inſeparably follows Property*. For before the

Reign

Reign of that Prince, the Ballance of Power againſt the Crown was in the Lords, and it cannot be well diſputed, but that the Crown had antiently, as unlimited a Power to erect *Burroughs*, as to create *Peers*. And therefore it is that until his Time, the Lords did not ſuffer the Prerogative of creating *Barons* to be exercis'd otherwiſe than in Parliament, tho' at the ſame Time they were not very unwilling the Crown ſhou'd create *Burroughs*, which the Commons had not always ſtrength enough to hinder, and which by being frequently ſituated upon the Lands of the Lords, were no inconſiderable Increaſe of their Power. But ſince that Reign the Lords having been ſet at full Liberty to alienate their Eſtates, Power has with the Poſſeſſion of Land ſhifted itſelf to the Commons, and accordingly they have been ever ſince the only formidable Curb upon the Crown. Until the End of Queen *Elizabeth*'s Reign, tho' the Prerogative of creating Peers ſtill grew, yet, as it was not exercis'd in a manner any thing groſs, it was not complain'd of; but *James* I. finiſh'd the Power of the Commons by parting with his Fee-Farm Rents, Court of Wards, &c. Lords he created innumerable, and ſome Burroughs; but the Crown ſoon found it convenient to quit that Practice; and now the Commons (juſt as the Lords did with relation to *Peerages*, while the *Barons* were Feudal) begin openly to diſpute the Power of creating *Burroughs*; and I believe every Reader will agree, that if a Burrough was now to be erected, its Members would find it pretty hard to gain Admiſſion into the Houſe of Commons.

But to conclude this Inquiry, it muſt be obſerv'd, that in every Reign ſince that of *James* I. there have unhappily been perpetual Diſputes between the Crown and the People, concerning the Bounds of Liberty and Prerogative; and therefore to an impartial Conſiderer of the Conſtitution, it will ſeem reaſonable in a Queſtion, relating to the *Conſtitution as ſuch*, to examine how it was underſtood before his Acceſſion; a View of which, ſo far as it relates to the *Peerage*, I have endeavour'd as fully as I was able to preſent to the Reader: And as for what has happen'd ſince the Acceſſion of *James* I. in relation to the numerous Creation of *Peers*, I ſhall only add, that it has been com-

plain'd of in every Reign. It was an Article againſt the Great Duke of *Buckingham*, the powerful Favourite of two Kings; and by ſeveral Proteſts in the Journals of the Houſe of Lords, during the Reign of *Charles* II. it is manifeſt that the Increaſe of the Peerage was by them then thought a Grievance; and every Man remembers, that the laſt Inſtance of the Abuſe of this Prerogative was, by the now ſitting Houſe of Commons, made an Article of Impeachment againſt the preſent Earl of *Oxford*.

FINIS.